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ARTICLES

Prosecutorial Misconduct in Closing Argument
Honorable J. Allison DeFoor, II

Florida's Property Appraisers
David M. Hudson

NOTES

Water Transfer: Shall We Sink or Swim Together?

The Products Liability Statute of Repose in
Florida: A Trap for the Unwary

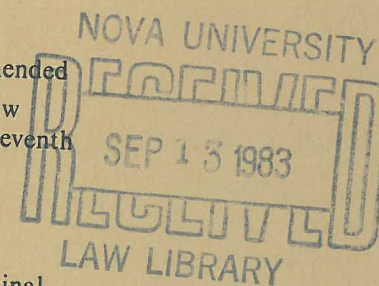
Will the Real Party in Interest Please Stand
Up? Florida Statutes Section 627.7262 as Amended

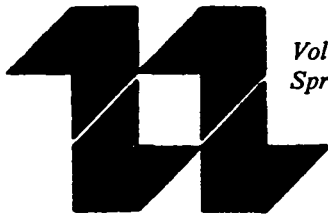
Entrapment: A Review of the Principles of Law
Governing This Defense as Applied by The Eleventh
Circuit Court of Appeals

CASE COMMENTS

Federal Judges' Absolute Immunity from Criminal
Prosecution Prior to Impeachment: *U.S. v. Hastings*

Apparent Authority and Antitrust Liability: An
Incompatible Combination? *American Society of
Mechanical Engineers, Inc. v. Hydrolevel Corporation*





Volume 7
Spring 1983

Contents

NOVA LAW JOURNAL

Articles

- 443 Prosecutorial Misconduct in Closing Argument
 Honorable J. Allison DeFoor, II
- 477 Florida's Property Appraisers
 David M. Hudson

Notes

- 523 Water Transfer: Shall We Sink or
 Swim Together?
- 563 The Products Liability Statute of Repose
 in Florida: A Trap for The Unwary
- 587 Will the Real Party in Interest Please
 Stand Up? Florida Statutes Section
 627.7262 as Amended
- 611 Entrapment: A Review of the Principles
 of Law Governing This Defense as Applied
 by The Eleventh Circuit Court of Appeals

Case Comments

- 623 Federal Judges' Absolute Immunity from
 Criminal Prosecution Prior to Impeachment:
 U.S. v. Hastings
- 641 Apparent Authority and Antitrust Liability:
 An Incompatible Combination? *American Society
 of Mechanical Engineers, Inc. v.
 Hydrolevel Corporation*

Prosecutorial Misconduct in Closing Argument

Honorable J. Allison DeFoor II*

Introduction

Prosecutorial misconduct in closing argument¹ is increasing in frequency and appears to be perniciously resistant to eradication. Because of its potentially disastrous effects² upon a criminal trial, it demands the attention of prosecutors and the defense bar alike. As stated by Mr. Justice Drew: "Many a winning touchdown has been called back and nullified because someone on the offensive team violated a rule by which the game was to be played."³

This article will explore the parameters imposed upon a prosecutor in Florida⁴ in arguments to the jury,⁵ the effects of failure to adhere to those standards,⁶ and the procedural rules governing this area of the law.⁷

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1. The reasoning may also be applied to improper opening statements, as the rule would be the same. Of course, there should, in theory, be no arguments advanced in opening. Cf. *Juhasz v. Darton*, 146 Fla. 484, 1 So. 2d 476, 478 (1941).

2. See *infra* text accompanying notes 203-07.

3. *Grant v. State*, 194 So. 2d 612, 616 (Fla. 1967).

4. The laws of other jurisdictions will only be considered as they reflect or amplify principles of Florida law.

5. Arguments have been referred to by commentators such as Note, *Prosecutor Forensic Misconduct—"Harmless Error?"* 6 UTAH L. REV. 108, 108 (1958) [hereinafter cited as *Prosecutor Forensic Misconduct*], and have been defined as "any activity by the prosecutor which tends to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in the manner prescribed by law, . . ." Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946, 949 (1954) [hereinafter cited as Note, *The Nature and Consequences of Forensic Misconduct*].

6. See *infra* text accompanying notes 203-07.

7. See *infra* text accompanying notes 208-28.

Recent Trends

The recent case of *State v. Gomez*⁸ concluded with the prosecutor's summation:

Don't let that gentleman [the victim] with three children and a wife walk away without justice in this case, facing possible jail, an arm that's hideously changed the rest of his life and let these gentlemen [the defendant and codefendant] walk away into our community and commit further crimes of this nature. These assassins must be put away. It is your duty to do that. You told me you'll do that.⁹

The Third District Court of Appeal expressed its obvious exasperation with the prosecutor thus: "We add to the growing list of cases requiring reversal on the basis of prosecutorial misconduct, the case of José Gomez."¹⁰ The court noted dryly that in this case, the victim for whom the prosecutor pled for "justice" was an admitted perjurer, as were all of the State's witnesses, while the "assassin" had no prior criminal record.¹¹

In the subsequent case of *Jackson v. State*,¹² the exasperation of the district court reached a peak. In the face of the prosecutorial argument which it termed "utterly and grossly improper,"¹³ the court in *Jackson* chose to react to the "veritable torrent of cases which have similarly involved significant prosecutorial improprieties committed by assistant state attorneys in this district."¹⁴ Noting that the volume of such cases included multiple improprieties by individual prosecutors,¹⁵ the court stated that a pattern seemed to be emerging: "[W]e must suspect, however reluctantly, that the improprieties may be deliberately

8. 415 So. 2d 822 (Fla. 3d Dist. Ct. App. 1982).

9. *Id.* at 823 (first bracket original, second bracket supplied by 3d Dist. Ct. App.).

10. *Id.*

11. *Id.*

12. 421 So. 2d 15 (Fla. 3d Dist. Ct. App. 1982).

13. *Id.*

14. *Id.* at 16. *See infra* note 20.

15. 421 So. 2d at 16. The court stressed it was not the prosecutor in the case *sub judice*. They appear to have been directing their fire at the *Gomez* prosecutor. *Id.* *See infra* note 24.

calculated to accomplish just what representatives of the state cannot be permitted — inducing a jury to convict by unfairly prejudicing it against the defendant.”¹⁶ The *Jackson* court noted that other sanctions, such as stern judicial admonitions, reversals, discipline by superiors or self-adherence to the prosecutor’s oaths and Code of Professional Responsibility, had all failed.¹⁷ The court went to to “serve notice”¹⁸ that it was prepared to go to the extraordinary measures of analyzing each instance of misconduct, to refer instances of abuse to the Florida Bar or to seek discipline directly in circuit court.¹⁹ While the year 1982 has yielded a great number of cases²⁰ and a large amount of public comment²¹ as well as strong judicial protest concerning reversal of criminal cases for improper prosecutorial argument,²² the phenomenon is by no means a recent one. Each generation of judges seems to supplant the preceeding one in decrying the occurrence of needless behavior which too often leads to the squandering of judicial resources. Yet it continues in the face of the sternest denunciations.²³

16. *Jackson*, 421 So. 2d at 16.

17. *Id.* at 16-17.

18. *Id.* at 17.

19. *Id.*

20. The year 1982 has yielded no less than ten reversals predicated upon improper closing arguments by prosecutors: *Wheeler v. State*, 1983 Fla. L.W. 124 (Fla. 1st Dist. Ct. App. 1982); *Collins v. State*, 423 So. 2d 516 (Fla. 3d Dist. Ct. App. 1982); *Coleman v. State*, 420 So. 2d 354 (Fla. 5th Dist. Ct. App. 1982); *Simpson v. State*, 418 So. 2d 984 (Fla. 1982); *Gomez v. State*, 415 So. 2d 822 (Fla. 3d Dist. Ct. App. 1982); *Harris v. State*, 414 So. 2d 557 (Fla. 3d Dist. Ct. App. 1982); *Ramos v. State*, 413 So. 2d 1302 (Fla. 3d Dist. Ct. App. 1982); *Cooper v. State*, 413 So. 2d 1244 (Fla. 1st Dist. Ct. App. 1982); *Harper v. State*, 411 So. 2d 325 (Fla. 3d Dist. Ct. App. 1982); *McMillan v. State*, 409 So. 2d 197 (Fla. 3d Dist. Ct. App. 1982) (a case reversed for improper questioning by the prosecutor); *Chapman v. State*, 417 So. 2d 1028 (Fla. 3d Dist. Ct. App. 1982); as well as several close calls, *Williams v. State*, 1983 Fla. L.W. 224 (Fla. 3d Dist. Ct. App. 1982) *Thomas v. State*, 419 So. 2d 634 (Fla. 1982); *Kindell v. State*, 413 So. 2d 1283 (Fla. 3d Dist. Ct. App. 1982); *Westley v. State*, 416 So. 2d 18 (Fla. 1st Dist. Ct. App. 1982); *Nelson v. State*, 416 So. 2d 899 (Fla. 2d Dist. Ct. App. 1982); *Breedlove v. State*, 413 So. 2d 1 (Fla. 1982). This trend has continued in 1983. See, e.g., *Edwards v. State*, ___ So. 2d ___, 8 Fla. L.W. 868 (Fla. 3d Dist. Ct. App. 1983).

21. *Fiery Talk Causes Reversal of Conviction*, Miami Herald, July 4, 1982, at 1B, col. 1 [hereinafter cited as *Fiery Talk*].

22. See *Jackson*, 421 So. 2d at 16.

23. “It imposes an added burden on the taxpayers for court expenses and clutters

In reality, such abuses may be regrettable, but they inevitably lurk at the threshold of every criminal trial.²⁴ This type of conduct arises

the docket of this court with unnecessary appeals." *Stewart v. State*, 51 So. 2d 494, 495 (Fla. 1951). *Compare* *Gomez v. State*, 415 So. 2d 822 with *Grant v. State*, 194 So. 2d 612, 615 (Fla. 1967) ("as an increasing number of cases reaching us in recent years, we must undo all of that which has been done and send this case back for a new trial") with *Stewart v. State*, 51 So. 2d 494, 494 (Fla. 1951) ("so many times condemned . . . that the law against it would seem to be so commonplace that any layman would be familiar with and observe it") with *Clinton v. State*, 53 Fla. 98, 114, 43 So. 312, 317 (Fla. 1907) ("No extended comment upon these utterances of counsel for the prosecution in their arguments to the jury is necessary."). *See also* Cain, *Sensational Prosecutions and Reversals*, 7 NOTRE DAME L. REV. 1 (1931).

24. "[I]solated examples of understandable, if inexcusable, overzealousness in the heat of trial," *Jackson*, 421 So. 2d at 16. In analyzing a number of such reversals which had occurred in her office recently, Eleventh Circuit State Attorney Janet Reno was quoted as citing a number of reasons which together she saw as producing the comments. *Fiery Talk*, *supra* note 21.

These factors were "greenness" of staff, lack of proper training, pressure of community concern over crime, the precariousness of the prosecutor's balancing act between advocate and seeker of justice, frustration over defense tactics, and the difference between appellate review of a cold record and the heat of trial with its split second decisions. *Id.*

Most of the factors cited are the inevitable by-product of the conflicting roles and duties of public prosecutors, discussed *infra* notes 28-42.

Ms. Reno may have hit the nail on the head in the discussion of the "greenness" of staff. This is a factor common to virtually every prosecutor's office, due to rapid turnover. The average tenure of a prosecutor nationwide is less than two years. *See* C. SILBERMAN, *CRIMINAL JUSTICE, CRIMINAL VIOLENCE* 375 (1978).

This inexperience leads to a failure to fully understand and reconcile the conflicting duties of advocate and seeker of justice. In *Gomez* the prosecutor, a Reno employee, was receiving his second reversal for such comments. Unchastened, he was quoted as strongly disagreeing with the appellate court decision (calling it a "travesty of justice," *Fiery Talk*, *supra* note 21), stating further that in his experience the less evidence against a defendant, the more likely he would be to resort to inflammatory argument. *Contra*, *State v. Cyty*, 50 Nev. 256, 256 P. 793 (1927) and *State v. Kirk*, 227 So. 2d 40 (Fla. 4th Dist. Ct. App. 1969).

The prosecutor was ultimately quoted as claiming "victory" based upon the two years incarceration which the defendant served during the pendency of the appeal — "When you get to the bottom line, I won." *Fiery Talk*, *supra* note 21. In discussing the apparently deliberate pattern of prosecutorial abuse which it saw emerging, the court in *Jackson* observed: "This may be — although we are loathe to consider the possibility — because some prosecutors believe that keeping a convicted defendant in prison during the sometimes lengthy appellate process is enough to chalk up a 'win' even if the

primarily as a by-product of the heat of combat²⁵ and the conflicting duties assumed by the public prosecutor.²⁶ As stated by Judge Mann with predictable eloquence, "[i]f oratory comes can reversal be far behind?"²⁷

The Public Prosecutor's Duty

While there are rules governing the conduct of all counsel in argument,²⁸ the prosecutor is uniquely placed in a position of conflicting professional obligations. Unlike the defense attorney whose duty, subject to certain obligations to the court, is to his client,²⁹ the prosecutor has duties to the State, to the defendant, as well as special obligations to the court and judicial system.³⁰

On one hand he is an advocate of his cause, expected to prevail for his client, the sovereign.³¹ At the same time, because of the nature of

conviction is later reversed." 421 So. 2d. at 16 n.4.

Another commentator has asserted that such abuses may be traced to four basic causes: "a) Sincere, but excessive, zeal of prosecuting attorneys; b) Headline seeking prosecutors; c) Sheer ignorance of the proper function of a prosecuting attorney and of criminal law; d) Timidity and indifference of trial court judges." Cain, *supra* note 23, at 2.

25. "[L]apsus linguae in the heat of argument," *Trafficante v. State*, 92 So. 2d 811, 814 (Fla. 1957). See also *Fiery Talk*, *supra* note 21; *Jackson*, *supra* note 24.

26. See *supra* note 24 and text accompanying notes 28-42.

27. *Chavez v. State*, 215 So. 2d 750, 750 (Fla. 2d Dist. Ct. App. 1968).

28. See, e.g., FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (1981).

29. For an excellent discussion of defense counsel and closing argument, see Martin, *Closing Argument to the Jury for the Defense in Criminal Cases*, 10 CRIM. L.Q. 34 (1967).

30. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice not merely to convict." FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981). ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function*, § 1.1 (Approved Draft 1971); *Kirk v. State*, 227 So. 2d 40, 43 (Fla. 4th Dist. Ct. App. 1969).

31. "[T]he prosecutor represents the sovereign. . ." FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13(1), *cf. id.* at 7-13(2); *Washington v. State*, 86 Fla. 533, 543, 98 So. 605, 609 (1923) "not to consider himself *merely* as attorney of record for the state, struggling for a verdict (emphasis supplied). "[H]e represents the great authority of the State of Florida." *Kirk*, 227 So. 2d at 43.

that power, he is expected to exercise it with great discretion.³² At odds with his duty as advocate, he has a specific duty to the defendant which requires him to negate or mitigate the defendant's guilt.³³ Beyond those duties, he has a special obligation to the court which has been termed "semi-judicial."³⁴ In the early case of *Washington v. State*,³⁵ the Florida Supreme Court summed up these often conflicting duties:

The prosecuting attorney occupies a semijudicial position. He is a sworn officer of the government, with no greater duty imposed on him than to preserve intact all the great sanctions and traditions of the law. It matters not how guilty a defendant in his opinion may be, it is his duty under oath to see that no conviction takes place except in strict conformity to law. His primary considerations should be to develop the facts and the evidence for the guidance of the court and jury, and not to consider himself merely as attorney of record for the state, struggling for a verdict.³⁶

In short his obligation is to see that "justice is done."³⁷

In argument before the jury these duties restrain the prosecutor from language which directs the jury to anything but the facts of the case and the law.³⁸ It has been asserted that the accused has a funda-

32. FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13(2); *Kirk*, 227 So. 2d at 43.

33. In our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.

FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13(3).

34. See, e.g., *Oglesby v. State*, 156 Fla. 481, 23 So. 2d 558 (Fla. 1945); *Akin v. State*, 86 Fla. 564, 572, 98 So. 609, 612 (1923); *Washington v. State*, 86 Fla. 533, 542, 98 So. 605, 609 (1923).

35. 86 Fla. 533, 98 So. 605 (1923).

36. *Id.* at 573-74, 98 So. at 609.

37. See FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13.

38. See FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106; ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* §§ 5.8, 5.9 (Approved Draft 1971).

mental right to a fair trial free of improper argument.³⁹ However, due to the nature of lawyers and the adversary system the line will often be difficult to draw.⁴⁰

The United States Supreme Court summed it up by stating: “[W]hile he may strike hard blows, he is not at liberty to strike foul ones.”⁴¹ Yet another court said of improper prosecutorial argument, “[i]f the state has a strong case, it is not necessary, and if it has a close case, such misconduct is gross injustice to the defendant.”⁴²

Comment upon the Defendant's Silence

The ultimate and unpardonable⁴³ sin in a prosecutor's argument is directing any comment towards the defendant's exercise of his right to remain silent.⁴⁴ Because of the special significance of the rules in this area, it will be considered first and separately. Rule 3.250 of the Florida Rules of Criminal Procedure forbids the prosecutor from commenting upon the failure of a criminal defendant to take the stand.⁴⁵ The

39. *Chavez v. State*, 215 So. 2d 50 (Fla. 2d Dist. Ct. App. 1968).

40. *Tyson v. State*, 87 Fla. 392, 394, 100 So. 254, 255 (1924). *See* ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* § 5.8 commentary at 122 (Approved Draft 1971). “To attempt to spell out in detail what can and cannot be said in argument is impossible, since it will depend on the facts of the particular case.” *See also infra* note 123.

41. *Berger v. United States*, 295 U.S. 78, 88 (1935).

42. *State v. Cyty*, 50 Nev. 256, —, 256 P. 793, 794 (1927). *Accord* *Kirk v. State*, 227 So. 2d 40, 43 (Fla. 4th Dist. Ct. App. 1959): “If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client.”

43. *See infra* text accompanying notes 44-61.

44. *Doyle v. Ohio*, 426 U.S. 610 (1976); *Brown v. State*, 367 So. 2d 616 (Fla. 1979).

45. The text of the rule reads as follows:

Accused as Witness

In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the

rule arises from several constitutional roots.

The prohibition against compelling a defendant to testify against himself has a long history in Florida⁴⁶ and United States Constitutional law.⁴⁷ In the later part of the eighteenth century, there was a nationwide erosion of the common-law rule which held a defendant incompetent to testify in his own behalf. While this story has been covered in more depth elsewhere,⁴⁸ suffice it to say that by 1895, an act of the legislature of Florida had fully abrogated the common-law rule, and a criminal defendant had the privilege to become a sworn witness in his own behalf, subject to the same status as any other witness.⁴⁹ This

jury.

Rule 3.250 FLA. R. CRIM. P. (1972 Rev.).

46. "No person shall be . . . compelled in any criminal matter to be a witness against himself." FLA. CONST. of 1968, art. 1, § 9. Similar provisions have been a part of Florida's Constitution since its original constitution in 1838. FLA. CONST. OF 1885, DECLARATION OF RIGHTS, § 12; FLA. CONST. OF 1868, DECLARATION OF RIGHTS § 8; FLA. CONST. OF 1865, art. 1, § 10; FLA. CONST. OF 1861, art 1, § 10; FLA. CONST. of 1838, art. 1, § 10.

47. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. This has been a part of the Constitution since 1791, though its parameters have been subject to expansion and contraction in recent years.

48. See J. WIGMORE, EVIDENCE § 579 (Chadbourn Rev. 1979); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

The sequence of this progression in Florida, and the nature of what Florida progressed from, has never been perfectly clear. See De Foor & Mitchell, *Hybrid Representation: The Right of Criminal Defendant to Participate in His Trial as Co-Counsel*, 10 STETSON L. REV. 191 (1981); De Foor, Lewis & Mitchell, *The Right to Dual Representation*, 18 HOUS. L. REV. 519 (1981). It is clear that Florida adhered to the common law rule. See cases cited in this note.

It is equally clear that by the latter part of the 19th century, the legislature had created the right for a criminal defendant to make a sworn statement to the jury, but without examination by counsel or the court. This innovation occurred in 1870. See Act Concerning Testimony, 1870 Fla. Laws, ch. 1816, § 1 (amended 1898); *Hancock v. State*, 79 Fla. 701, 706, 85 So. 142, 143-44 (1920) (Brown, J., dissenting); *Millar v. State*, 15 Fla. 577, 584 (1876). This right was broadened by the legislature in 1895 to make the defendant in a criminal case subject to all of the rules applicable to witnesses. See text of the Act contained infra at note 49. See also *Hart v. State*, 38 Fla. 39, 20 So. 805 (1896).

49. Act to Amend Section 2908, 1895 Fla. Laws 4420, § 1 (repealed 1970) provided:

Accused may Make Himself a Witness. In all criminal prosecutions the

same act also stated “nor shall any prosecuting attorney be permitted before the court or jury to comment on the failure of the defendant to testify in his own behalf.”⁵⁰ This provision is still seen as an essential protection of the right against self-incrimination which became necessary once a defendant had the opportunity to testify in his own behalf.⁵¹

While the United States Supreme Court has fairly recently made it clear that any such comment is strictly prohibited by the fifth amendment,⁵² the Florida courts took a similar position early-on. By 1924 the Florida Supreme Court had taken the then-minority⁵³ view that such comment was improper and incurable.⁵⁴ Further, the impro-

accused may at his option be sworn as a witness in his own behalf and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the court or jury to comment on the failure of the accused to testify in his own behalf.

This remained the law, essentially unchanged until its repeal in 1970. *See Ratiner, Adverse Comments by a Florida Prosecutor upon a Defendant's Failure to Testify*, 15 U. MIAMI L. REV. 293, 295 n.12 (1961) and history of FLA. STAT. 918.091 (1959). The provisions of Florida Statutes section 918.09 were adopted into Rule 3.250 of the Florida Rules of Criminal Procedure in 1967 and were unchanged in the 1972 revision, *see* Committee Notes Rule 3.250, FLA. R. CRIM. P., and remain the law in Florida.

50. Act to Amend Section 2908, 1895 Fla. Laws 4420, § 1. Florida prosecutors began to test the limits with the basic “unexplained and uncontradicted” evidence argument, almost immediately. *Gray v. State*, 42 Fla. 174, 28 So. 53 (1900). *See infra* notes 66-93 and accompanying text.

51. *Gordon v. State*, 104 So. 2d 524, 540 (Fla. 1958); *Burse v. State*, 175 So. 2d 586, 587 (Fla. 3d Dist. Ct. App. 1968). *See generally* Ratiner, *supra* note 49.

52. *Calloway v. Wainwright*, 409 U.S. 59 (1968); *Griffin v. California*, 380 U.S. 609 (1965).

53. *See* Ratiner, *supra* note 49 and Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 960 n.68.

54. *Rowe v. State*, 87 Fla. 17, 31-32, 98 So. 613, 618 (1924). As early as 1903 the supreme court had indicated in dicta that there “might” be cases where such comment would not be reversible error while not finding it to be likely. *Jackson v. State*, 45 Fla. 38, 34 So. 243 (1903).

The rule had an interesting evolution in Florida. *Simmons v. State*, 139 Fla. 645, 190 So. 756 (1939) became the principal case for the proposition that this sort of error was not subject to the harmless error rule. *Simmons* was directly repudiated in *State v. Hines*, 195 So. 2d 550 (1967), which was itself repudiated and the rule of *Simmons* was re-established in *Willinsky v. State*, 360 So. 2d 760, 762-63 (Fla. 1978).

The recent decision of *Clark v. State*, 363 So. 2d 331, 335-36 (Fla. 1978) dis-

priety of the comment is not affected by how inadvertant or indirect⁵⁵ the comment might be, or by the prosecutor's denial of any intent to comment on the defendant's right.⁵⁶ In terms of construction, if the comment is subject to an interpretation that brings it within the rule, it is so construed, regardless of susceptibility to a differing construction.⁵⁷ Indeed, the cases reversing for prosecutorial comment on this point have ranged from the egregious⁵⁸ to the subtle.⁵⁹ The rule applies equally to comment by a prosecutor about the failure of a co-defendant to testify.⁶⁰ It does not extend, however, to such comment by a co-defendant's counsel.⁶¹

A failure to contemporaneously object to the comment will be seen

cussed *infra* at note 207, which places strict technical requirements upon the receipt of the benefits of this rule, has been seen as another retreat. (Adkins, J., dissenting).

55. Flaherty v. State, 183 So. 2d 607, 609 (Fla. 4th Dist. Ct. App. 1966)(and cases cited therein). *But see* Helton v. State, 424 So. 2d 137 (Fla. 1st Dist. Ct. App. 1982).

56. Trafficante v. State, 92 So. 2d 811 (Fla. 1957); Milton v. State, 127 So. 2d 460 (Fla. 2d Dist. Ct. App. 1961).

57. Rowe v. State, 87 Fla. 17, 31, 98 So. 613, 618 (1924); Jackson v. State, 45 Fla. 38, 34 So. 243 (1903).

The rule may well be such as to be stated thus: if the prosecutor's comment is "fairly susceptible of being interpreted by the jury as a statement to the effect that an innocent man would attempt to explain the circumstances but the defendant offered no such explanation. . . ." then the comment thus interpreted or construed violated the prohibition of the rule. David v. State, 369 So. 2d 943, 944 (Fla. 4th Dist. Ct. App. 1977) (quoting David v. State, 348 So. 2d 420, 421 (Fla. 4th Dist. Ct. App. 1973) (Mager, J., dissenting), which quashed the lower court's decision.

58. As an example of the egregious *see* David v. State, 369 So. 2d 943 (Fla. 1979). The defense attorney apparently had hypothesized a defense predicated upon a business failure. The prosecutor argued the permissible line of "Where is the evidence," *see infra* notes 66-77, only to succumb to "If he had a business failure, . . . why didn't he say anything. . . ." *David*, 369 So. 2d at 944 (emphasis omitted). The conviction was reversed.

59. As an example of the subtle, *see* Hall v. State, 364 So. 2d 866 (Fla. 1st Dist. Ct. App. 1978) where the prosecutor referred to the defense counsel's attempt to shift the focus of the case from the defendant whom he characterized as sitting there "quietly." *Id.* at 867.

60. Clouser v. State, 152 So. 2d 200, 201 (Fla. 2d Dist. Ct. App. 1963); Harper v. State, 151 So. 2d 881, 883 (Fla. 2d Dist. Ct. App. 1963).

61. Jenkins v. State, 317 So. 2d 114, 115 (Fla. 3d Dist. Ct. App. 1975); Smith v. State, 238 So. 2d 120, 121 (Fla. 3d Dist. Ct. App. 1970). *But see* Cruz v. State, 328 So. 2d 24 (Fla. 3d Dist. Ct. App. 1976). *See generally*, Annot., 1 A.L.R.3d 989 (1965).

as waiver of the benefits of this rule.⁶² A defendant may also waive the benefits of the rule by taking the stand⁶³ or by comment of defense counsel.⁶⁴ Further, by taking the stand he becomes subject to the full range of cross-examination based on what he did and did not say.⁶⁵

However, not all comments which seem to brush against this subject are cause for reversal. Much confusion has resulted from a prosecutor's characterization of his case as "uncontroverted" or "unexplained" in cases where the defendant did not testify. Prosecutors were using this *double entendre* almost as soon as they were prohibited from commenting upon a defendant's silence.⁶⁶ For a long while such comments were allowed on the theory that they were comments on the evidence, not the defendant's silence.⁶⁷ The trend then began to run the other way, to the point that one court held "when the defendant elects not to testify, it is error to refer to the State's evidence as unexplained or uncontradicted, or undenied."⁶⁸

The supreme court later allowed such a comment in two cases

62. Clark v. State, 363 So. 2d 331, 335 (Fla. 1978).

63. Hufham v. State, 400 So. 2d 133 (Fla. 5th Dist. Ct. App. 1982); Blackwell v. State, 271 So. 2d 187 (Fla. 1st Dist. Ct. App. 1972); Clinton v. State, 53 Fla. 98, 43 So. 312 (1903).

64. See Doctrine of Invited Comment or Fair Reply, *infra*, text accompanying notes 152-70.

65. [T]he failure of the defendant to testify cannot be taken or considered as any admission against his interest; but, if a defendant voluntarily takes the stand and testifies as a witness in his own behalf, then he becomes subject to cross-examination as any other witness, and the prosecuting officer has the right to comment on his testimony, his manner and demeanor on the stand, the reasonableness or unreasonableness of his statements, and on the discrepancies which may appear in his testimony to the same extent as would be proper with reference to testimony of any other witness.

Dabney v. State, 119 Fla. 341, 343, 161 So. 380, 381 (1935). Accord Jordan v. State, 334 So. 2d 589 (Fla. 1976); Odom v. State, 109 So. 2d 163 (Fla. 1959); Craft v. State, 300 So. 2d 307, 308 (Fla. 2d Dist. Ct. App. 1974); Coney v. State, 258 So. 2d 497 (Fla. 3d Dist. Ct. App. 1972); Peel v. State, 154 So. 2d 910 (Fla. 2d Dist. Ct. App. 1963).

66. Gray v. State, 42 Fla. 174, 28 So. 53 (1900).

67. *Id.* See also Clinton v. State, 56 Fla. 57, 47 So. 389 (1908).

68. Singleton v. State, 183 So. 2d 245 (Fla. 2d Dist. Ct. App. 1966) (citing Way v. State, 67 So. 2d 321 (Fla. 1953)). Accord Trafficante v. State, 92 So. 2d 811 (Fla. 1957).

where the defense counsel advanced theories of coerced confession⁶⁹ and insanity without the defendant's testimony.⁷⁰ Then, in the case of *White v. State*,⁷¹ the Third District Court held that such a comment was permitted as a comment on the evidence where the testimony of several witnesses was heard.⁷² This was approved by the supreme court, which cited the earlier line of cases allowing such comment.⁷³ Subsequently in *Smith v. State*,⁷⁴ the Fifth District Court of Appeals relying on *White* stated: "Indeed, if a prosecutor could not make fair comment on the fact that the state's evidence of guilt was uncontroverted, what would be left for him to argue in a case where the defendant declined to testify?"⁷⁵ The district court has since reaffirmed its position in the case of *Elam v. State*.⁷⁶ The Third District has taken a similar view in the case of *Budman v. State*.⁷⁷

Some of the confusion in this area has resulted from the jury instruction based on the common-law presumption that a person in unexplained possession of recently stolen property is presumed to know it was stolen.⁷⁸ The question was whether the instruction was an infringe-

69. "Now did you hear one thing about him getting beaten up, or somebody was pounding on his head, forcing him into this?" *State v. Mathis*, 278 So. 2d 280, 281 (Fla. 1973).

70. "Now where is the evidence that he says he didn't know what he was doing?" *State v. Jones*, 204 So. 2d 515, 516 (Fla. 1967).

71. 348 So. 2d 368 (Fla. 3d Dist. Ct. App. 1977).

72. "You haven't heard one word of testimony to contradict what she [State's witness] said, other than the lawyer's argument." *Id.* at 369.

73. "It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue. It is thus firmly embedded in the jurisprudence of this state that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury." *White v. State*, 377 So. 2d 1149, 1150 (Fla. 1979) (citations omitted). Firmly embedded indeed! See cases at note 68.

74. 378 So. 2d 313 (Fla. 5th Dist. Ct. App. 1980), *aff'd*, *Smith v. State*, 394 So. 2d 407 (Fla. 1980).

75. *Id.* at 314.

76. 389 So. 2d 221 (Fla. 5th Dist. Ct. App. 1980).

77. 362 So. 2d 1022 (Fla. 3d Dist. Ct. App. 1978).

78. *Florida Standard Jury Instruction in Criminal Cases, Theft* 148 provides:

Proof of possession of recently stolen property, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen.

ment of the defendant's right to remain silent.⁷⁹ Early cases held that a prosecutor may not use the instruction in argument, but the instruction itself was approved.⁸⁰

In light of the positions taken by the courts in *White*,⁸¹ *Budman*,⁸² and *Smith*,⁸³ this confusion may not be relevant. The exact parameters placed upon the prosecutor's argument that the evidence is uncontroverted, remain unclear from these opinions. May it be advanced at all times, or only where it may be seen as a comment on the evidence, rather than on the defendant's silence? The language of the Fifth District in *Smith*⁸⁴ and *Elam*⁸⁵ suggest the former, while the language of the Third District in *White*⁸⁶ suggests the latter.⁸⁷

There are several directions which the Florida courts might head on this point.⁸⁸ Some jurisdictions allow such comments if they appear to refer to a witness other than the defendant.⁸⁹ The Florida courts already allow comment that the defendant did not provide a witness that he could reasonably be expected to provide.⁹⁰ Still others would seem to allow this line of argument⁹¹ even when the defendant would

79. See generally *State v. Young*, 217 So. 2d 567 (Fla. 1968), cert. denied, 396 U.S. 853 (1969) and *Smith v. State*, 394 So. 2d 407 (Fla. 1980).

80. The instruction has been held to be constitutional. See cases cited *supra* note 79. *Ard v. State*, 108 So. 2d 38 (Fla. 1959). The case ignores the fact that such an explanation need not necessarily come from the defendant himself.

81. 348 So. 2d 368.

82. 362 So. 2d 1022.

83. 378 So. 2d 313.

84. *Id.*

85. 309 So. 2d 221.

86. See *supra* text accompanying notes 75-76.

87. "If the evidence presented a situation where the only person who could have contradicted the witness' testimony was the defendant himself, then this comment might have been interpreted as the defendant suggests." 348 So. 2d at 369.

88. See generally *Annot.*, 14 A.L.R.3d 723 (1967).

89. See, e.g., *Desmond v. United States*, 345 F.2d 225 (5th Cir. 1965).

90. The witness must be competent and available. *Buckrem v. State*, 355 So. 2d 111 (Fla. 1978). This is especially true if a witness is a spouse. *Jenkins v. State*, 317 So. 2d 90 (Fla. 1st Dist. Ct. App. 1975).

91. It can take other forms: see, e.g., "undenied," *State v. Hampton*, 430 S.W.2d 160 (Mo. 1968); "unrefuted," *United States v. Guiliano*, 383 F.2d 30 (3d Cir. 1967); "uncontroverted," *Ruiz v. United States*, 365 F.2d 103 (10th Cir. 1966).

be the only witness who could reasonably be expected to refute it.⁹² Clarification will be needed on this point in the future. In a related matter, Florida courts have allowed prosecutors to argue that guilt could be inferred from the defendant's flight.⁹³

Permissible Scope of Argument

Other than the special rules concerning comment upon the defendant's failure to testify, the rules concerning a prosecutor's argument are fairly broad. As long as his arguments are predicated upon the evidence in the case,⁹⁴ "wide latitude is permitted in argument to the jury."⁹⁵ The prosecutor is allowed to advance all legitimate arguments,⁹⁶ and is free to make logical inferences based upon the evidence to support his theory of the case.⁹⁷ The Supreme Court of Florida has stated that these inferences may include "the fanciful play of imaginations,"⁹⁸ and inferences are not objectionable merely because they overcharacterize,⁹⁹ or soundness of logic, or relevancy¹⁰⁰ may be lack-

92. See, e.g., *People v. Stanbeary*, 126 Ill. App. 2d 244, 261 N.E.2d 765 (1970).

93. Cf. *Palmer v. State*, 323 So. 2d 612 (Fla. 1st Dist. Ct. App. 1975) and cases cited therein at 615 n.2.

94. *Powell v. State*, 93 Fla. 756, 112 So. 608 (1927); *Johnson v. State*, 88 Fla. 461, 464, 102 So. 549, 550 (1924); *Washington v. State*, 86 Fla. 533, 98 So. 605 (1923); *Akin v. State*, 86 Fla. 564, —, 98 So. 609, 618 (1922).

95. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982); *Thomas v. State*, 326 So. 2d 413 (Fla. 1975); *Spencer v. State*, 133 So. 2d 729 (Fla. 1961), *cert. denied*, 369 U.S. 880 (1962), *cert. denied* 372 U.S. 904 (1963); *Smith v. State*, 365 So. 2d 405 (Fla. 3d Dist. Ct. App. 1979); *Johnson v. State*, 348 So. 2d 747 (Fla. 3d Dist. Ct. App. 1977); *Pitts v. State*, 307 So. 2d 473 (Fla. 1st Dist. Ct. App. 1975), *cert. dismissed*, 423 U.S. 918 (1975); *Wilson v. State*, 305 So. 2d 5 (Fla. 3d Dist. Ct. App. 1974); *Frazer v. State*, 294 So. 2d 291 (Fla. 1st Dist. Ct. App. 1974).

96. *Spencer*, 133 So. 2d at 731.

97. *Breedlove*, 413 So. 2d at 8; *Spencer*, 133 So. 2d at 731.

98. *Gaston v. Stater*, 134 Fla. 538-542, 184 So. 150, 151-52 (1938); *Johnson v. State*, 86 Fla. 461, —, 102 So. 549, 550 (1924). "His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit or wing to his imagination." *Washington v. State*, 82 Fla. 533, —, 98 So. 605, 609 (1923) (citing *Mitchum v. State*, 11 Ga. 615, 631 (1852)).

99. See, e.g., *Schneider v. State*, 152 So. 2d 731 (Fla. 1963). In *Schneider* the prosecutor's argument dwelt upon the deceased's head having been "blown-off," while, in fact, he had been shot in the head and neck. *Id.* at 735.

ing. Generally speaking, much discretion is vested in the trial court in keeping counsel's arguments within the scope of the issues and evidence.¹⁰¹ There have been cases where prosecutors made statements so far from the facts as to constitute deliberate misrepresentation.¹⁰² Such cases are, fortunately, rare, and are so obviously reprehensible and reversible as to be undeserving of further comment.¹⁰³

Prosecutor's Statement of Opinion or Personal Belief

The prosecutor in a case is an advocate, and not a sworn witness capable of rendering testimony, much less any sort of expert testimony such as an opinion.¹⁰⁴ By rendering an opinion in a factual or ultimate matter concerning a case, a prosecutor, in effect, renders unsworn testimony not subject to cross-examination.¹⁰⁵ The advocacy of a prosecutor's opinion has been prohibited by Florida law at least since 1907,¹⁰⁶ and is also in violation of the Code of Professional Responsibility,¹⁰⁷ yet

100. *Brown v. State*, 80 Fla. 741, 744, 86 So. 574, 575 (1920); *Wilson v. State*, 47 Fla. 118, 36 So. 580 (1904); *Mitchell v. State*, 43 Fla. 584, 31 So. 242 (1901). *Cf. Gines v. State*, 97 Fla. 908, —, 112 So. 525, 527 (1929); *Goshea v. State*, 97 Fla. 621, 121 So. 797 (1929).

101. See cases cited *supra* note 94.

102. See, e.g., *Berger v. United States*, 295 U.S. 78, 85 (1935); *Flicker v. State*, 296 So. 2d 109, 113 (Fla. 1st Dist. Ct. App. 1977).

103. *Cf. Berger*, 295 U.S. 78. ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* § 5.8 (Approved Draft 1971). See also ABA STANDARDS, *The Defense Function* § 7.8 (Approved Draft 1971), as to a similar obligation upon the defense. *Cf. Akin v. State*, 86 Fla. 564, 574, 98 So. 609, 613 (1924).

104. "It is generally understood that the expression by counsel in argument before the jury or personal opinion of guilt is not only bad form but highly improper, as counsel is not a witness, nor under oath to speak the truth, nor called as an expert to give his opinion." *Tyson v. State*, 87 Fla. 392, 394, 100 So. 254, 255 (1924).

105. Comment (a) to ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* § 5.8, 127 (Approved Draft 1971). Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 955 (1954).

106. *Adams v. State*, 54 Fla. 1, 45 So. 494 (1907).

107. Disciplinary Rule DR 7-106(c)(4) (1981) of the Code of Professional Responsibility states:

"(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(4) Assert his personal opinion as to the justness of the cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the

it remains a common source of error.¹⁰⁸

The statement by the prosecutor of his belief as to the defendant's guilt is also impermissible. Prosecutors are human beings who often believe very strongly in the justness of their cause.¹⁰⁹ As stated truthfully though improperly by one prosecutor: "The State doesn't prosecute someone because of their religion or race or their nationality. We prosecute them because we believe they are guilty of crimes."¹¹⁰ Such comments are prohibited though they do not always constitute reversible error.¹¹¹ Especially to be avoided are opinions which imply superior knowledge or investigation beyond the facts in evidence, as the foundation for the opinion.¹¹² There is a great danger that because of the pres-

guilt or innocence of an accused; but he may argue, on his analysis of the evidence for any position or conclusion with respect to the matters stated herein."

108. See cases cited *infra* notes 110-15.

109. See, e.g., the remarks of the reversed prosecutor contained in *Fiery Talk*, *supra* note 14. See also Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 948. "He may consider himself engaged in a war against crime in which no holds are barred in the struggle to overcome powerful, unscrupulous opposition." The same commentator went on to note more dryly: "Besides, a record of many convictions is important to the prosecutor who wishes to further his political ambitions. Even convictions subsequently reversed for misconduct have political utility, especially where the trial is accompanied by sensational publicity, for the reversal may receive less attention than the trial and the reputation of the fighting district attorney will be preserved." *Id.*

110. *Reed v. State*, 333 So. 2d 524, 525-26 (Fla. 1st Dist. Ct. App. 1976). For virtually identical statements see *McGuire v. State*, 411 So. 2d 439 (Fla. 4th Dist. Ct. App. 1982); *Price v. State*, 267 So. 2d 39 (Fla. 4th Dist. Ct. App. 1982). Another prosecutor stated the same thoughts, perhaps more mundanely by stating that the state believed in the defendant's guilt "or we would not be here," *Buckhann v. State*, 356 So. 2d 1327, 1328 (Fla. 4th Dist. Ct. App. 1978). Yet another prosecutor went for the homerun equivalent in expressing his belief in the defendant's guilt "with all my heart, mind and soul." *Wilson v. State*, 371 So. 2d 126, 127 (Fla. 1st Dist. Ct. App. 1978).

111. *Grant v. State*, 171 So. 2d 361, 365 (Fla. 1965), *cert. denied*, 384 U.S. 1014 (1966); *Tyson v. State*, 87 Fla. 392, 100 So. 54 (1927); *Arline v. State*, 303 So. 2d 37 (Fla. 1st Dist. Ct. App. 1974); *Roundtree v. State*, 229 So. 2d 281 (Fla. 1st Dist. Ct. App. 1969).

112. In the case of *Thompson v. State*, 318 So. 2d 549 (Fla. 4th Dist. Ct. App. 1975) the reversed prosecutor flatly asserted that he had numerous other witnesses he could have called, and this was termed "highly improper." *Id.* at 552. *Cf.* *Richardson v. State*, 335 So. 2d 835 (Fla. 4th Dist. Ct. App. 1976). Similar results have been obtained where the opinion offered was a collective one, such as is obtained at a prose-

tige of the office, and the presumably greater fact-finding abilities of the office, the jury will be led to rely on the prosecutors opinion.¹¹³ This substitutes the prosecutor for the trier of fact, and is most likely to be deemed reversible error.¹¹⁴ Expressions of personal belief as to the credibility of witnesses are equally prohibited.¹¹⁵

Not every comment which begins with "I think" is seen as an improper expression of the prosecutor's opinion regarding the merits of the case. There is a difference between the prosecutor's statement of his belief in the defendant's guilt and his belief that the evidence proved the defendant's guilt, with the latter allowed.¹¹⁶

The use of the words "I think" have been held, in context, to be a deduction based upon the evidence,¹¹⁷ or a prefatory statement,¹¹⁸ rather than an expression of opinion. Curiously, a prosecutor has been allowed to state that he felt he was justified in filing an information,¹¹⁹ and expressions of shock over a crime¹²⁰ have also been allowed. However, it clearly is the more ethical, professional and prudent practice for

cutor's office conference; *Pait v. State*, 112 So. 2d 380, 384 (Fla. 1959); or in the form of office policy, *Cummings v. State*, 412 So. 2d 436, 439 (Fla. 4th Dist. Ct. App. 1982); or even the entire State of Florida, *Buckhann v. State* 356 So. 2d 1327, 1328 (Fla. 4th Dist. Ct. App. 1978); or of the police, *Cumbe v. State*, 378 So. 2d 1 (Fla. 3d Dist. Ct. App. 1978), *quashed*, 330 So. 2d 1031 (Fla. 1980). *See also* *Oglesby v. State*, 23 So. 2d 558 (Fla. 1945) (police could tack other offenses on defendant); *Berger v. United States*, 295 U.S. 78, 88 (1935).

113. Commentary, ABA STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function* § 5.8 (Approved Draft 1971).

114. *Thomson v. State*, 318 So. 2d 549, 552 (Fla. 4th Dist. Ct. App. 1975).

115. *Cummings v. State*, 412 So. 2d 436 (Fla. 4th Dist. Ct. App. 1982); *Buckhann v. State*, 356 So. 2d 1327 (Fla. 4th Dist. Ct. App. 1978); *Hancock v. State*, 90 Fla. 178, 195 So. 401 (1925).

116. *See Adams v. State*, 54 Fla. 1, 5, 45 So. 494, 495 (1907); *Washington v. State*, 86 Fla. 533, 536, 98 So. 605, 608 (1925). *Cf.* *Coleman v. State*, 215 So. 2d 96, 98 (Fla. 4th Dist. Ct. App. 1968). *See generally*, DR 7-106(c)(4) (1981), *Budman v. State*, 362 So. 2d 1022 (Fla. 3d Dist. Ct. App. 1978).

117. *Coleman*, 215 So. 2d at 98 ("If you believe as I do.").

118. *Edwards v. State*, 288 So. 2d 540, 540 (Fla. 2d Dist. Ct. App. 1974) "the prosecutor had an unfortunate habit of using these words to introduce each new topic of discussion."

119. *Hancock v. State*, 90 Fla. 178, 185, 105 So. 401, 403 (1925). The theory advanced by the court seemed to be the redundancy and obviousness of the statement.

120. *Girtman v. State*, 270 So. 2d 380, 381-82 (Fla. 3d Dist. Ct. App. 1972).

a prosecutor to strike the words "I think" from his trial vocabulary.

Inflammatory Argument

Under the guiding principle that argument should be restricted to the record and to reasonable inferences therefrom, argument which is inflammatory is objectionable.¹²¹ As stated by Mr. Justice Terrell, "[t]he trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament."¹²² Obviously, given the nature of a criminal trial, and of lawyers, this will be another difficult line to draw.¹²³ Much discretion is vested in the trial court,¹²⁴ but here are some general guidelines.

Arguments which ask the jurors to place themselves in the shoes of the victim, so-called golden-rule arguments, are held to be improper.¹²⁵ Perhaps the clearest example of such an argument may be found in the case of *Lucas v. State*,¹²⁶ where the prosecutor in a rape case asked of the female jurors, "[t]hink how you ladies would feel it that happened to you."¹²⁷ It was held that this comment required reversal because it tended to deprive the defendant of his right to trial by an impartial jury.¹²⁸

121. "[T]rials should be conducted coolly and fairly, without the indulgence in abusive or inflammatory statements made in the presence of the jury by the prosecuting officer." *Goddard v. State*, 93 Fla. 504, 515, 112 So. 83, — (1927); *Landrum v. State*, 79 Fla. 189, 84 So. 535 (1920); *Clinton v. State*, 53 Fla. 98, 43 So. 312 (1907).

122. *Stewart v. State*, 51 So. 2d 494, 495 (Fla. 1951).

123. "The history of the legal profession is clear also in its love of florid arguments and dramatic perorations. The line between the inflammatory and the dramatic is not clear." *Collins v. State*, 180 So. 2d 340, 342 (Fla. 1965).

124. *Sanchez v. State*, 133 Fla. 160, 182 So. 2d 645 (1938).

125. See, e.g., *Adams v. State*, 192 So. 2d 762, 763 (Fla. 1966) ("your wife . . . your sister . . . your daughter" in a prosecution for murder); *Coley v. State*, 185 So. 2d 472, 473 (Fla. 1966) ("their little daughter" in a rape prosecution in which the prosecutrix was 17 years old); *Barnes v. State*, 88 So. 2d 157, 158 (Fla. 1952) ("what if it was your wife or your sister or your daughter that this beast was after?").

126. 335 So. 2d 566 (Fla. 1st Dist. Ct. App. 1976).

127. *Id.* at 567.

128. *Id.* Accord *Lester v. State*, 37 Fla. 382, 387, 20 So. 232, 234 (1896). The rule and rationale are the same in civil cases. See, e.g., *Bullock v. Branch*, 130 So. 2d 74, 76 (Fla. 1st Dist. Ct. App. 1961).

Character

Under the Florida Statutes and case law, the character of the defendant may not be the subject of proof or prosecutorial comment except in very limited circumstance. If the defendant offers proof of his character, the State may offer evidence of other crimes, charges, or acts as rebuttal¹²⁹ if they are relevant and the state complies with notice requirements.¹³⁰ Despite the clear nature of this rule, prosecutors

129. FLA. STAT. § 90-404(1) (1981) provides:

90.404 Character evidence; when admissible. —

(1) CHARACTER EVIDENCE GENERALLY —

Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except:

(a) *Character of accused* — Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the trait.

(b) *Character of victim* —

(1) Except as provided in s. 794.022, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait; or

(2) Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor.

(c) *Character of witness* — Evidence of the character of a witness, as provided in ss. 90.608-90.610.

See *Young v. State*, 142 Fla. 361, 195 So. 569 (1939); *Clinton v. State*, 53 Fla. 98, 43 So. 312 (1907).

130. FLA. STAT. § 90.404 (2) (1981) provides:

90.404 Character evidence; when admissible. —

(2) OTHER CRIMES, WRONGS, OR ACTS —

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(b)1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an

have been stumbling frequently on it for years. The cases generally divide themselves into two categories,¹³¹ past bad acts and future bad acts.¹³²

The fundamental rule as to past acts was stated in the early case of *Simmons v. State*.¹³³ "It is well settled that statements or intimations by the prosecuting attorney that the accused has committed other crimes besides that for which he is now on trial constitutes error."¹³⁴

The argument disallowed in *Simmons*, a rape case, was a classic example of the type of argument sought to be prevented by the rule: "And we don't know how many other girls this old Simmons has carried off that way who have never complained. . . ." ¹³⁵ This argument is improper precisely because we *don't* know.¹³⁶

This rule may be violated in more subtle ways. Cases have found

indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

(3) Nothing in this section affects the admissibility of evidence under § 90.610.

This statute embodies the so-called "Williams Rule," allowing the prosecutor to use similar acts as evidence against a criminal defendant in certain circumstances. *See Williams v. State*, 110 So. 2d 654, 663 (Fla. 1959), *cert. denied*, 361 U.S. 847 (1959). *See generally Green v. State*, 190 So. 2d 42, 46 (Fla. 2d Dist. Ct. App. 1966). For an excellent discussion in the context of prosecutorial questioning in this area, see *Chapman v. State*, 417 So. 2d 1028 (Fla. 3d Dist. Ct. App. 1982).

131. *See infra* text accompanying notes 133-41.

132. *See infra* text accompanying notes 142-45.

133. 139 Fla. 645, 190 So. 756 (1939), *overruled on other grounds*, 195 So. 2d 550 (1957); *State v. Hines*, 195 So. 2d 551 (Fla. 1967).

134. *Id.* at 758. *Accord*, *Ailer v. State*, 114 So. 2d 348 (Fla. 2d Dist. Ct. App. 1959); *Carlile v. State*, 129 Fla. 860, 176 So. 862 (1937).

135. *Simmons*, 190 So. at 758. *Cf. Young v. State*, 142 Fla. 351, 195 So. 569 (1939).

136. In *Oglesby v. State*, 156 Fla. 481, 482, 23 So. 2d 558, 558 (1945), the prosecutor stated at trial that the only reason the police had arrested the defendant was because they could pin similar crimes on him.

the characterization of the defendant in a DUI case as a “drunkard” improper.¹³⁷ Any intimation of prior criminal charges is objectionable whether the reference is made directly¹³⁸ or indirectly.¹³⁹ Indeed one of the most common errors found in the cases comes from the inference raised by reference to the defendant’s photo in a “mug book” or “mug shots,”¹⁴⁰ though it is not necessarily fatal error.¹⁴¹

The prohibition against implying future criminal acts may well be the most commonly violated rule by prosecutors.¹⁴² Case after case reveals the prosecutor improperly raising before the jury the spectre of the defendant walking out the door, ready to commit more crimes. None stated it quite so well as did the prosecutor in *Davis v. State*,¹⁴³ who summed up in this fashion: “Gentlemen, if this man is sent out on the street to do the very same thing, the only question that can never be resolved, if you will, or put in the same position to ask, ‘Am I to be next?’”¹⁴⁴ Such comments routinely produce reversals.¹⁴⁵

137. *Young*, 195 So. at 569.

138. *See, e.g.*, *Gluck v. State*, 62 So. 2d 71 (Fla. 1952); *Noeling v. State*, 40 So. 2d 120 (Fla. 1949).

139. In *Sherman v. State*, 255 So. 2d 263, 265 (Fla. 1971), the prosecutor, referring to the defendant, stated: “He’s seen me lots of times. It’s not been under social circumstances. . . .”

140. *See, e.g.*, *State v. Rucker*, 330 So. 2d 470 (Fla. 1976); *Loftin v. State*, 273 So. 2d 70 (Fla. 1973); *Jones v. State*, 194 So. 2d 24 (Fla. 3d Dist. Ct. App. 1967).

141. *See State v. Rucker*, 330 So. 2d 470 (Fla. 1976).

142. *See infra* note 145.

143. 214 So. 2d 41 (Fla. 3d Dist. Ct. App. 1968).

144. *Id.* at 42.

145. *See, E.g.*, *Grant v. State*, 194 So. 2d 612, 613 (Fla. 1967) (“Do you want to give this man less than first degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?”); *Williams v. State*, 68 So. 2d 583 (Fla. 1953) (acquittal of defendant by reason of insanity would lead to his ultimate release from asylum to commit another homicide); *Young v. State*, 195 So. 569, 569 (Fla. 1940) (“the good honest people of the country should not sit down in solitude, in inaction, and let these whores and drunkards get out here and slay our women and children”); *Gomez v. State*, 415 So. 2d 822, 823 (Fla. 3d Dist. Ct. App. 1982) (“let these gentlemen . . . walk away into our community and commit further crimes of this nature”); *McMillan v. State*, 409 So. 2d 197, 198 (Fla. 3d Dist. Ct. App. 1982) (“if you want to let [defendant] walk out of here, if you want to let this kind of horrible crime go on in Dade County”); *Sims v. State*, 371 So. 2d 211, 212 (Fla. 3d Dist. Ct. App. 1977) (“to [g]o get another one” in a case involving firearms); *Porter v. State*, 347 So. 2d 449, 449-50 (Fla. 3d Dist. Ct. App. 1977) (“to turn this pusher on the

The prosecutor must also be careful of the characterizations which he draws from the facts and circumstances of the case, as well as characterizations of the defendant. The easiest to deal with are the most objectionable. Arguments directed at the defendant's race¹⁴⁶ or religion,¹⁴⁷ when not in issue, are clearly prohibited, as are arguments directed at geographical prejudices.¹⁴⁸ Courts have allowed references to a defendant as a "murderer"¹⁴⁹ in a murder case, or a "thief"¹⁵⁰ in a larceny case, but "assassin"¹⁵¹ has been disapproved, as has the statement that the prosecutor "wouldn't want to meet the defendant in a dark alley."¹⁵²

From the cases, it would seem that the dividing line is based first upon relevancy, and second upon whether there is fair factual basis for the characterization in the record. Strong characterizations such as "beast," "cruel human vulture," and "vile creature"¹⁵³ have been al-

streets again" and "to put this man on the street to sell more heroin"); *Russell v. State*, 233 So. 2d 154, 155 (Fla. 4th Dist. Ct. App. 1970) (if the defendant were acquitted, there would be "people getting stabbed all over Orange County"). *Accord*, *Johnson v. State*, 408 So. 2d 813 (Fla. 3d Dist. Ct. App. 1982); *Chavez v. State*, 215 So. 2d 750, 750 (Fla. 2d Dist. Ct. App. 1968) ("let him go back out in your community and handle more morphine"). In the case of *Singer v. State*, 109 So. 2d 7, 28-30 (Fla. 1959), the court held that argument directed at what the defendant would do to the prosecutor's family if defendant was not executed was reversible error.

146. *Cooper v. State*, 136 Fla. 23, 186 So. 230 (Fla. 1939); *Huggins v. State*, 129 Fla. 329, 176 So. 154 (Fla. 1937).

147. *Gluck v. State*, 62 So. 2d 71 (Fla. 1952).

148. *Knight v. State*, 316 So. 2d 576, 578 (Fla. 1st Dist. Ct. App. 1975).

149. *Washington v. State*, 86 Fla. 533, 98 So. 605, 609 (1923). "It is not reversible error for the prosecuting attorney to refer to the defendant as a murderer where the indictment is for murder and the evidence supports the charge."

150. *Sanchez v. State*, 133 Fla. 160, 165, 182 So. 645, 648 (1938), termed a "border line question."

151. *Landrum v. State*, 79 Fla. 189, 84 So. 535 (1920); *Gomez v. State*, 415 So. 2d 822, 822 n.1 (Fla. 3d Dist. Ct. App. 1979).

152. *Zamot v. State*, 375 So. 2d 881 (Fla. 3d Dist. Ct. App. 1979).

153. *Collins v. State*, 180 So. 2d 340, 342 (Fla. 1965); *See also Breedlove v. State*, 413 So. 2d 1, 8 n.10 (Fla. 1982) ("animalistic attack"); *Darden v. State*, 329 So. 2d 287, 289 (Fla. 1976), *cert. granted*, 429 U.S. 917 (1976), *cert. dismissed*, 430 U.S. 704 (1977) and *cert. granted*, 429 U.S. 1036 (1976) (defendant called an "animal"); *Goddard v. State*, 143 Fla. 28, 31, 196 So. 596, 598 (1940) ("skunks," "low-down scoundrel"); *Gaston v. State*, 124 Fla. 538, 539, 184 So. 150, 151 (1938) ("malignant growth").

lowed where there is support for them in the record.¹⁵⁴ The courts seem to take the position that some cases are factually so extreme that there is little a prosecutor might say to make it worse.¹⁵⁵ As stated in *Spencer v. State*:¹⁵⁶ "In actuality, there is probably very little that the prosecutors themselves could have advanced which would have been any more damning of the conduct of this appellant than the gruesome evidence which was presented from the witness stand."

As a general rule, inflammatory arguments are distasteful and are considered a sign of incompetence.¹⁵⁷ A competent prosecutor will sustain his burden under the law with the facts, not by resort to innuendo in order to give his case a false appearance of strength.¹⁵⁸

Attacks on Opposing Counsel

It appears that from time to time prosecutors seem unable to restrain themselves in their zeal, as they go beyond verbal assaults on the defendant to attacks on defense counsel.¹⁵⁹ They have said some shocking things about their adversaries.¹⁶⁰ The case of *Douglass v. State*¹⁶¹

154. See, e.g., *Roundtree v. State*, 229 So. 2d 281, 283 (Fla. 1st Dist. Ct. App. 1970).

155. See *infra* note 156.

156. 133 So. 2d 729, 731-32 (Fla. 1961), *cert. denied*, 369 U.S. 905 (1963). *Accord* *Holmes v. State*, 228 So. 2d 417, 419 (Fla. 3d Dist. Ct. App. 1969) ("it would have been difficult for a prosecutor in this case to overcharacterize the reprehensible acts shown in the evidence, or to present the facts in a worse light than the bare disclosure of them at the trial revealed"). See generally Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 969, n.112.

157. *Daugherty v. State*, 154 Fla. 308, 310, 17 So. 2d 290, 291 (1944).

158. *Peterson v. State*, 376 So. 2d 1230, 1235 (Fla. 4th Dist. Ct. App. 1979); *Kirk v. State*, 227 So. 2d 40, 42-43 (Fla. 4th Dist. Ct. App. 1968).

159. *Jackson v. State*, 421 So. 2d 15 (Fla. 3d Dist. Ct. App. 1982); *Johnson v. State*, 351 So. 2d 10 (Fla. 1977); *Adams v. State*, 192 So. 2d 762 (Fla. 1966); *Irvin v. State*, 66 So. 2d 288 (Fla. 1953), *cert. denied*, 346 U.S. 927 (1954); *Carter v. State*, 356 So. 2d 67 (Fla. 1st Dist. Ct. App. 1978); *Simpson v. State*, 352 So. 2d 125 (Fla. 1st Dist. Ct. App. 1977); *Cochran v. State*, 280 So. 2d 42 (Fla. 1st Dist. Ct. App. 1973); *Evans v. State*, 178 So. 2d 892 (Fla. 3d Dist. Ct. App. 1965), and notes 160-164.

160. E.g., "Would you buy a used car from this guy" and "cheap shot artist." *Jackson v. State*, 421 So. 2d at 16 n.1.

Let me show you what perverted and distorted things a lawyer can do

represents the worst example. In *Douglass*, the defendant was on trial for incest, and the prosecutor gratuitously suggested that defense counsel was also guilty of incest.¹⁶² The courts have sternly disapproved of such arguments, terming them both highly improper and unethical.¹⁶³ Such conduct, though, seems to be subject to the harmless error rule¹⁶⁴ and the doctrine of fair reply.¹⁶⁵

when he wants to do it. How wrong it is, and when they try to do such as this it is disgusting.

If he thought Mrs. Mayer had one word of testimony, he, himself, violated his oath as a lawyer and violated his representation of this man and as a human being. . . . He has no business being a lawyer if he hadn't talked with her and found out that she knew nothing about it.

Adams, 192 So. 2d at 764. "How defense lawyers operate. . .," *Cochran*, 280 So. 2d at 43. "One of the favorite tricks of a defense lawyer," *Simpson*, 352 So. 2d at 126. *But see* *Westley v. State*, 416 So. 2d 18, 19-20 (Fla. 1st Dist. Ct. App. 1982) in which "smokescreen" was approved.

161. 135 Fla. 199, 184 So. 756 (1929).

162. *Id.* at 757. It was such a comment which prompted the Third District Court in *Jackson* to threaten to take disciplinary action against the Assistant State Attorney. See note 160 *supra*.

163. The court in *Simpson* termed the prosecutor's statement "a gratuitous insult to the adversary system which he serves." 352 So. 2d at 126. See FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 7-37 (1981):

In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

164. *E.g.*, In *Irvin*, 66 So. 2d 288, and *Simpson*, 352 So. 2d 125, the error was found harmless. In *Adams*, 192 So. 2d 762, *Cochran*, 280 So. 2d 42, and *Carter*, 356 So. 2d 67, it was held fatal. In *Irvin*, the comment was merely that the defense attorney "stopped me from proving it," 66 So. 2d at 295, referring to a defense objection which had been sustained. See also *Johnson*, 351 So. 2d 10.

165. See, *e.g.*, *Evans v. State*, 178 So. 2d 892 (Fla. 3d Dist. Ct. App. 1965). In *Evans* defense counsel sought to discredit law enforcement efforts in the case, asking why they hadn't been able to find an alibi witness which she had found and produced at trial. The prosecutor's reply was "[w]e were wondering about that too," implying a fabricated defense. *Id.* at 893.

Duty

At the bottom of every prosecutor's bag of rhetorical tricks is that personal favorite — the appeal to the jurors to "perform their public duty," and bring in a verdict of guilty.¹⁶⁶ Generally, so long as the prosecutor stays otherwise within bounds, this line of argument is permissible.¹⁶⁷ The sterner or more coercive the language used, the more likely to be disapproved. For instance, the appeal "We are going to continue to have life treated as a scrap of paper in the State of Florida, until juries with backbones rise up and say we are going to stop it," was disallowed.¹⁶⁸

The prosecutor must not, however, seek to shift or lighten the burden upon the jurors by references to the existence of appellate courts to correct any mistake they might make, and such references are reversible error.¹⁶⁹ Nor may a prosecutor appeal to the jury to convict because of economic loss caused to them as taxpayers by the defendant.¹⁷⁰ However, in a drug case alleging possession of marijuana, the statement "[t]hat is the reason so many high school students over the

166. *Spencer v. State*, 133 So. 2d 729 (Fla. 1961), *cert. denied*, 369 U.S. 880 (1961), *cert. denied*, 372 U.S. 904 (1963).

167. "We realize that the situation in some cases justifies very strong appeals by the prosecution to arouse the patriotism and public duty of the jurors to perform the duty which the law and the evidence in a case plainly justifies and calls for." *Henderson v. State*, 94 Fla. 318, 345, 113 So. 689, 698 (1927). *Accord* *Thomas v. State*, 326 So. 2d 413, 415 (Fla. 1976); *Betsy v. State*, 368 So. 2d 436 (Fla. 3d Dist. Ct. App. 1979).

168. *Johnson v. State*, 140 Fla. 443, 445, 191 So. 847, 848 (1939). The Johnson court however found the error harmless. *Id.* *Cf.* *Reed v. State*, 333 So. 2d 524, 525 (Fla. 1st Dist. Ct. App. 1976). It is noteworthy how contemporary the argument in *Johnson* sounds.

169. *Pait v. State*, 112 So. 2d 380, 384 (Fla. 1959); *Blackwell v. State*, 76 Fla. 124, 137, 79 So. 731, 735 (1918). *See generally*, Annot., 3 A.L.R.3d 1449 (1965). *Cf.* *Johnson v. State*, 408 So. 2d 813, 816 (Fla. 3d Dist. Ct. App. 1982) (unheard of for a person to spend more than two years in a hospital if declared insane).

170. *Taylor v. State*, 123 Fla. 358, 359, 166 So. 825, 826 (1936) (references to the jurors supporting defendant's children in a criminal non-support case held reversible error). *Cf.* *Cooper v. State*, 136 Fla. 23, 186 So. 230 (1939) (reference to taxpayers' dollars spent investigating and prosecuting "Negro" cases, coupled with appeals to social prejudice held reversible error). A mere casual reference to the amount of time and money expended by the jurors and the state, while not commended, does not necessarily require reversal. *Ellison v. State*, 91 Fla. 502, 107 So. 639 (1926).

country are using narcotics"¹⁷¹ was held to be not per se prejudicial.

There are a few areas of argument that are more a matter of style than substance, yet they have cropped up in trials and case law from time to time. First of these is a reading of law by counsel in closing argument. Fundamentally, it is the function of the court, not counsel, to give to the jury the applicable law in the case.¹⁷² Counsel submit their requested charges at the charge conference, and the court selects the theories of law applicable to the case.¹⁷³ Once selected, counsel are clearly permitted to relate the applicable law to the facts of the case in closing argument, explaining and emphasizing those portions of the charges relevant to their theory of the case.¹⁷⁴

It has been said that it is "difficult for an attorney in the trial of a case to refrain from expressing his view or opinion as to the law controlling the case"¹⁷⁵ but the jury is not bound by counsel's opinion as to the controlling law.¹⁷⁶ There have been cases in which the court, in its discretion, permitted counsel to read other authorities to the jury. In *Tindall v. State*,¹⁷⁷ the judge's allowance of a prosecutor's reading of law to the jury was upheld, absent a showing of prejudice.¹⁷⁸ The court stated, however, "correct practice does not permit counsel to read authorities to the jury."¹⁷⁹ In the case of *Wright v. State*¹⁸⁰ the prosecu-

171. *Sims v. State*, 64 So. 2d 561 (Fla. 1953).

172. In *Brownlee v. State*, 95 Fla. 755, 116 So. 618 (1928), the defendant appealed the trial court's refusal to allow defense counsel to read certain statutes to the jury. The court held: "The rule that the law and statutes applicable to any case are to be given by the court and not counsel is too elementary and universally recognized to require any discussion here." *Id.* at 628. See also FLA. R. CRIM. P. 3.390; FLA. STAT. § 918.10 (1981).

173. *Simmons v. State*, 160 Fla. 326, —, 36 So. 2d 207, 208 (1948); *Tindall v. State*, 99 Fla. 1132, —, 128 So. 494, 498 (1930); *Taylor v. State*, 330 So. 2d 91, 93 (Fla. 1st Dist. Ct. App. 1976).

174. *Taylor*, 330 So. 2d at 93.

175. *Overstreet v. State*, 143 Fla. 794, 796, 197 So. 516, 518 (1940).

176. *Id.*

177. 99 Fla. 1132, 128 So. 494 (1930).

178. The *Tindall* court made it clear that even when allowed by the trial court, the practice could cause reversal if the law read were inapplicable and prejudicial. Such a showing, however, was not made in *Tindall*. *Id.* at —, 128 So. 498.

179. *Id.*

180. 79 Fla. 831, 84 So. 919 (1920).

tor's repeated misstatements of law constituted reversible error.¹⁸¹ Tangentially related is the question of whether counsel may read scripture¹⁸² to the jury. This is held to be a matter of discretion left to the trial court and is generally not cause for reversal.¹⁸³

The Doctrine of Invited Response or Fair Reply

The normal parameters of a prosecutor's remarks in closing argument can be significantly broadened by the nature of the defense's argument. The rule was stated in *Pitts v. State*:¹⁸⁴ "Defense counsel may not make statements during summation which reasonably invite response and then complain when his opponent's response is such as would be reasonably expected to be elicited by defense counsel's own prior remarks."¹⁸⁵

In the earlier case of *Henderson v. State*,¹⁸⁶ the Court laid down the rule:

[W]e cannot afford to lay down a rule here which would make it hereafter possible for an attorney for the defendant in any hard fought criminal case to deliberately goad the state's attorney, by unfounded or improper charges and insinuations, into heated, indiscreet, and improper reply, and to then use such reply to secure a reversal of the case, regardless of the sufficiency of the evidence, thus enabling him to take advantage of his own wrong. This would, indeed, be a dangerous precedent.¹⁸⁷

When the door is opened by defense counsel's argument, it swings wide, and a number of areas barred to prosecutorial comment will sud-

181. *Id.* at 919.

182. *Paramore v. State*, 229 So. 2d 855, 861 (Fla. 1969) (Prosecutor's references to "divine law" and the Bible).

183. *Id.* at 860-61.

184. 307 So. 2d 473 (Fla. 1st Dist. Ct. App. 1975), *cert. dismissed*, 423 U.S. 918 (1975).

185. *Pitts*, 307 So. 2d at 482 (citing *Frazier v. State*, 294 So. 2d 691 (Fla. 1st Dist. Ct. App. 1974)). *Accord* *Howell v. State*, 136 Fla. 582, 589, 187 So. 163, 166 (1939); *Reyes v. State*, 49 Fla. 17, 24, 38 So. 257, 258 (1905); *Ricko v. State*, 242 So. 2d 763 (Fla. 3d Dist. Ct. App. 1971).

186. 94 Fla. 318, 113 So. 689 (1927).

187. *Id.* at 697.

denly be subject to reply. What otherwise would have been improper comment by the prosecutor will be seen as harmless. Defense counsel who promises to prove an alibi or other facts in his opening argument may find those promises thrown back in his face by the prosecutor in summation.¹⁸⁸ In the case of *Simpson v. State*¹⁸⁹ the Court found no error in the prosecutor's reiteration of the law stating that the defendant's silence could not be held against him after defense counsel had covered the point earlier.¹⁹⁰ The court properly termed the comments "perilous practice."¹⁹¹ But in one interesting case the defendant attorney's comment that the fact the defendant didn't take the stand didn't make him guilty was held to invite the response that it didn't make him innocent either.¹⁹²

Normally, argument directed at the potential penalty the defendant faces is improper.¹⁹³ Arguments as to the penalty which a defendant would receive upon conviction are fair reply where defense counsel crosses this line first.¹⁹⁴ In *Smith v. State*¹⁹⁵ defense counsel's comment

188. See, e.g., *Mitchell v. State*, 304 So. 2d 466, 468 (Fla. 3d Dist. Ct. App. 1974).

189. 352 So. 2d 125 (Fla. 1st Dist. Ct. App. 1977).

190. *Id.* at 126. The court found the prosecutor's remarks had no "sinister influence." *Id.* (citing *Gordon v. State*, 104 So. 2d 524, 540 (Fla. 1958)).

191. *Id.*

192. *Testasecca v. State*, 115 So. 2d 584 (Fla. 2d Dist. Ct. App. 1959).

193. *Cf. Waid v. State*, 58 So. 2d 146 (Fla. 1952).

It is a curious state of the law in Florida that the judge must instruct the jury on the penalties in the case, FLA. R. CRIM. P. 3.390(a), *Tascano v. State*, 393 So. 2d 540 (Fla. 1981), and yet the jury is not to consider penalties in any way in reaching its decision, Florida Standard Jury Instruction 2.15, *adopted In re Standard Jury Instructions in Criminal Cases*, 327 So. 2d 6 (Fla. 1976). Therefore argument by counsel concerning penalties would be improper.

These antagonistic themes have been termed "a Lewis Carroll fantasy flight back and forth through the legal looking glass." *Murray v. State*, 378 So. 2d 111, 112 (Fla. 5th Dist. Ct. App. 1980).

194. But appellant's position is insecure for the simple reason that his counsel, while addressing the jury, introduced the subject by remarking upon the lack of testimony by the appellant, and the reason for it. What followed was nothing more than a report by the attorney for the state.

A defendant may not reap the benefits of failure to testify, such as the escape of cross-examination, and then claim the protection the statutes afford, if he plays upon that very failure. When he brings to the attention of the jury the want of testimony by him, and the reason for the course he

that a verdict of not guilty by reason of insanity would not put the defendant back on the street, was held to justify the prosecutor's comments that the defendant could be there in 30-60 days. Where the defendant strained the facts of the case so that they approached a hypothetical circumstance, the court did not view the prosecutor's question, "where is the proof?"¹⁹⁸ as a comment upon the defendant's silence. Even sympathetic characterizations of the defendant by defense counsel must be approached with caution. In *Whitney v. State*¹⁹⁷ the defense portrayed the defendant as a mere boy, an irresponsible youth, whose crime had its roots in his domestic background.¹⁹⁸ The court held this to be an invitation to rebuttal and allowed the prosecution to portray the defendant as a "professional killer" who "lived by the gun," based upon the evidence of the defendant's methodical manner in killing and robbing.¹⁹⁹ The invited response doctrine has been used to excuse verbal sparring²⁰⁰ in the presence of the jury and other highly improper statements²⁰¹ which resulted from the heat of the exchange and the responsive nature of the prosecutor's argument. Even the expression of a prosecutor's belief in the justness of his cause has been excused by the defense portrayal of the prosecution as offering "bold lies," "false testimony," and "buying" evidence.²⁰²

chose, he invites a rebuttal from his adversary, and of that he cannot complain.

Waid, 58 So. 2d 146, 146.

195. 273 So. 2d 414 (Fla. 2d Dist. Ct. App. 1973). The prosecutor went that fatal one step too far by saying "because there is no possibility of keeping him there longer." *Id.* at 415.

196. *Sadler v. State*, 222 So. 2d 797, 800 (Fla. 2d Dist. Ct. App. 1969). In *Sadler*, defense counsel had conjured up a possible affair and love triangle, seemingly out of the air. Similarly, in *State v. Mathis*, a defense argument to consider the voluntariness of the confession, unsupported by any evidence of coercion, was held to invite the rhetorical question if the jury had heard "one thing about [the defendant] getting beaten up. . .," 278 So. 2d 280, 281 (Fla. 1973).

197. 132 So. 2d 599 (Fla. 1961).

198. *Id.* at 602.

199. *Id.*

200. *See, e.g., Parrish v. State*, 97 So. 2d 356 (Fla. 3d Dist. Ct. App. 1957).

201. *Evans v. State*, 178 So. 2d 892 (Fla. 3d Dist. Ct. App. 1965) (prosecutor suggested a contrived alibi defense).

202. *See, e.g., Broge v. State*, 288 So. 2d 280, 281 (Fla. 4th Dist. Ct. App. 1974).

Effects of Misconduct

When a prosecutor advances an improper argument, the abdication of his duty imposes certain obligations upon defense counsel and the court. Even absent any objection, it is the duty of the trial court to check the improper remarks of counsel, and to apply the appropriate remedy in order to erase its effect from the mind of the jury.²⁰³

Where the defense doesn't object to a remark, it is more likely to be viewed as nonprejudicial or the objection seen as waived.²⁰⁴ Accordingly, it is the duty of defense counsel to call to the attention of the court the prosecutor's improper argument by objecting to it.²⁰⁵ Further, the objection must be contemporaneous with the improper conduct.²⁰⁶ It is incumbent upon defense counsel to seek the remedy which he feels is appropriate in light of the comment.²⁰⁷

Remedies and Technical Requirements

The court may remedy the improper argument by stopping it, striking it, applying a curative instruction, rebuking the prosecutor before the jury, or declaring a mistrial. The nature of the prosecutor's remark, the seriousness of the charge, and the motion made by defense counsel are the key factors in consideration of the appropriate remedy for prosecutorial misconduct in argument.

In some cases, upon objection, the prosecutor has withdrawn the argument and apologized for it, and this has been seen as sufficient cure.²⁰⁸ In other cases merely halting the line of argument by sustaining the objection was sufficient.²⁰⁹ Many comments may be cured

203. *Oglesby v. State*, 23 So. 2d 558 (Fla. 1945); *Akin v. State*, 86 Fla. 564, 572, 98 So. 609, 612 (1923).

204. *E.g.*, *Smith v. State*, 3 So. 2d 516, 517 (Fla. 1941).

205. *E.g.*, *Pait v. State*, 112 So. 2d 380, 385 (Fla. 1959).

206. *Castor v. State*, 365 So.2d 701, 703 (Fla. 1978).

207. "The important thing is that the defendant retain primary control over the course to be followed in the event of such an error." *Clark v. State*, 363 So. 2d 331, 335 (Fla. 1978)(citing *United States v. Dinitz*, 724 U.S. 600 (1976)).

208. *North v. State*, 65 So. 2d 77, 86-87 (Fla. 1953), *aff'd*, 346 U.S. 932 (1954).

209. *See, e.g.*, *Collins v. State*, 180 So. 2d 340 (Fla. 1965); *Dean v. State*, 83 So. 2d 777 (Fla. 1955). *Accord*, *Cumbie v. State*, 378 So. 2d 1 (Fla. 1st Dist. Ct. App. 1978), *quashed*, 380 So. 2d 1031 (Fla. 1980).

by the court's rebuking the prosecutor before the jury in a manner sufficient to impress the members of the jury that they should not consider the argument, and further instructing the jury to disregard the comment, and adding any other necessary curative instructions.²¹⁰

The final option is declaration of a mistrial.²¹¹ Generally speaking, defense counsel should contemporaneously object, seek curative instructions, and then affirmatively move for a mistrial,²¹² in order to preserve his rights on appeal.²¹³ Failure to comply with these procedural requirements may be seen as a bar to raising the issues on appeal.²¹⁴ Further, as noted earlier, the doctrine of fair reply or invited comment may preclude relief for an otherwise objectionable statement.²¹⁵ However, where the prosecutor's comments are "of such character that neither rebuke nor retraction may entirely destroy their sinister influence . . . a new trial should be granted regardless the lack of objection or exception."²¹⁶ In such cases the error is seen as going to the heart of the case, depriving the defendant of the essential fairness of his criminal trial.²¹⁷

Certain trends emerge from the cases. On one hand, some arguments almost inevitably cause reversal when objected to by counsel. These include the previously mentioned categories of comment upon the defendant's silence,²¹⁸ appeals to racial prejudice,²¹⁹ or predictions

210. *Harper v. State*, 411 So. 2d 235, 237 (Fla. 3d Dist. Ct. App. 1982) (citing *Deas v. State*, 119 Fla. 893, 161 So. 2d 729 (1939)).

211. *Cf. Cumbe v. State*, 380 So. 2d 1031 (Fla. 1980); *Mabery v. State*, 303 So. 2d 369, 370 (Fla. 3d Dist. Ct. App. 1974).

212. *Clark v. State*, 363 So. 2d 331, 335 (Fla. 1978).

213. *Ferguson v. State*, 417 So. 2d 639 (Fla. 1982). "Contemporaneously" means during the offending closing argument, or at the very least at its conclusion. *Cumbe*, 380 So. 2d at 1033.

214. *Ferguson*, 417 So. 2d at 641-42.

215. *See supra* text accompanying notes 184-201.

216. *Ailer v. State*, 114 So. 2d 348, 351 (Fla. 2d Dist. Ct. App. 1959). *Accord*, *Peterson v. State*, 376 So. 2d 1230, 1234 (Fla. 4th Dist. Ct. App. 1979).

217. *Peterson*, 376 So. 2d at 1230. Defense counsel should not rely on this resort, however, since it is limited to the narrow category where the error is fundamental. *Cf. Clark*, 363 So. 2d at 333. Since the *Clark* case found unobjected-to prosecutorial comment upon the defendant's silence not to be such error, it should be clear that this will be true only in rare cases.

218. *See supra* text accompanying notes 43-92.

219. *See supra* note 146. *Cf. Thomas v. State*, 419 So. 2d 634 (Fla. 1982).

of future criminal activity.²²⁰ On the other hand, there is no presumption that juries are led astray by the improper arguments of counsel.²²¹ The appellate court must review each case in its own context²²² with the standard being whether the court can see from the record that the remarks or conduct of the prosecutor did not prejudice the accused.²²³ Unless that conclusion is reached, the case must be reversed. The nature²²⁴ and frequency²²⁵ of the prosecutor's comments are weighed on one hand, and the overall strength of the state's case²²⁶ on the other. Also involved in this balancing process is the nature of the charge; courts will be less hesitant to find the argument prejudicial in a capital case.²²⁷ It remains the duty of defense counsel, however, to show prejudice. It should be remembered that the defendant is entitled to a fair trial, not a perfect one.²²⁸

Future Directions

Of course, reversal is not the only solution to the problem. Indeed

220. See *supra* text accompanying notes 142-45.

221. *Paramore v. State*, 229 So. 2d 855, 860 (Fla. 1969). *Accord*, *Tyson v. State*, 87 Fla. 392, 393, 100 So. 254, 255 (1924); *Johnson v. State*, 348 So. 2d 646 (Fla. 3d Dist. Ct. App. 1977).

222. *State v. Jones*, 204 So. 2d 515, 519 (Fla. 1967).

"Statements that might appear improper when considered in a vacuum, may be found permissible when examined in context." *Nelson v. State*, 416 So. 2d 899, 900 (Fla. 2d Dist. Ct. App. 1982)(quoting *United States v. Forrest*, 620 F. 2d 446, 455-56 (5th Cir. 1980)). *Accord*, *McMillan v. State*, 409 So. 2d 197 (Fla. 3d Dist. Ct. App. 1982).

223. *Pait v. State*, 112 So. 2d 380 (Fla. 1959); *McCall v. State*, 120 Fla. 707, 163 So. 38 (1938). *Accord* *Coleman v. State*, 420 So. 2d 354, 356 (Fla. 5th Dist. Ct. App. 1982).

224. *Berger v. United States*, 295 U.S. 78, 89 (1935); *Mabery v. State*, 303 So. 2d 369, 370 (Fla. 3d Dist. Ct. App. 1974).

225. *Berger*, 295 U.S. at 78.

226. *Cummings v. State*, 412 So. 2d 436, 439 (Fla. 4th Dist. Ct. App. 1982); *McMillan v. State*, 409 So. 2d 197 (Fla. 3d Dist. Ct. App. 1982). *Cf.* *Coleman v. State*, 420 So. 2d 354 (Fla. 2d Dist. Ct. App. 1982).

227. See *Grant v. State*, 194 So. 2d 612 (Fla. 1967); *Pait v. State*, 112 So. 2d 380, 385 (Fla. 1959); *Jones v. State*, 194 So. 2d 24 (Fla. 3d Dist. Ct. App. 1967).

228. *Zide v. State*, 212 So. 2d 788, 790 (Fla. 3d Dist. Ct. App. 1968) (citing *Lutwak v. United States*, 344 U.S. 604 (1953)).

the reversal of a case for this cause may prejudice society more than the prosecutor. Witnesses disappear, memories fade and it becomes more difficult to prosecute the defendant several years later at the conclusion of the appellate process. It has also been suggested that some prosecutors, however unethically, may be anticipating ultimate reversal, but view the time served by a defendant in the interim as sufficient punishment²²⁹ — so-called “state attorney time.” Some prosecutors may feel it expedient to “win” today and deal with the reversal later.²³⁰

The virtue of the sanction threatened by the court in *Jackson v. State*,²³¹ disciplinary action against the offending prosecutor, is that it places the deterrent effect directly where it will do the most good. Disciplinary action could be applied in the local courts in the form of contempt of court²³² or disciplinary proceedings,²³³ and a punishment molded to the offense. The Florida Bar could impose penalties ranging from reprimand to disbarment.²³⁴ Other commentators have explored yet other remedies, including civil liability,²³⁵ and removal from office,²³⁶ each with its own drawbacks.²³⁷ The reluctance of trial courts to act in such a fashion, and the fact that no appellate case in Florida save *Jackson* has ever proposed a remedy other than reversal, may be traced to the same point of origin — the courts are reluctant to be so at odds with the quasi-judicial officers who are viewed as an arm of the

229. See comments of the court in *Jackson v. State*, 421 So. 2d 15 (1982).

230. Cain, *supra* note 23, at 41.

231. *Jackson v. State*, 421 So. 2d 15; Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 25, at 981. Cf. *Kleinfeld v. State*, 270 So. 2d 22 (Fla. 3d Dist. Ct. App. 1972) and case cited therein.

232. *Shelley v. District Court of Appeal*, 350 So. 2d 471 (Fla. 1977); see also Rule 3.840, Fla. R. Crim. P.

233. Fla. Bar Integr. Rule art. XI Rule 11.14; see generally *Burns v. Huffstetler*, ___ So. 2d ___ (Fla. 1983), 13 Fla. L.W. at 164 (May 12, 1983).

234. Fla. Bar Integr. Rule art. XI, Rules 11.01-11.13, see also *Jackson*, 421 So. 2d 15; Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5.

235. Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 979. Prosecutors at common law were absolutely immune from liability for acts in the scope of their duties. This immunity was not changed by 42 U.S.C. 1983. See *Imbler v. Pachtman*, 424 U.S. 409 (1976). This, of course, could be altered by statute.

236. Note, *The Nature and Consequences of Forensic Misconduct*, *supra* note 5, at 980.

237. *Id.*

court.²³⁸ It is natural to expect of prosecutors proper motives and conduct. The recriminations inherent in allegations to the contrary are doubtless not relished by anyone on either side.

It is not the purpose of this article to explore the nontraditional alternatives available to the courts in deterring prosecutors from such comments. The court's opinion in *Jackson*, while not an empty threat, is intended as a warning shot across the bow, designed to turn prosecutors away from such actions. If the warning is not heeded, the courts and commentators will be revisiting the subject within a year.

238. *Smith v. State*, 194 So. 2d 310 (Fla. 1957).

Florida's Property Appraisers

David M. Hudson*

I. Introduction

The property appraiser today plays a central role in the imposition of ad valorem taxes by Florida's local governmental units. The amount of ad valorem taxes imposed on a parcel of property is computed by multiplying the *tax rate*, expressed in mills,¹ times the *tax base*, which is the value of property not exempt or immune from the levy. The taxing authority establishes the rate for levying its tax,² while the property appraiser determines the value of property in the tax base. In the process of valuation, the property appraiser initially determines whether the property is exempt or immune from ad valorem taxation, or qualifies for special treatment.³ Next, he determines the "just value" of each item or parcel of taxable property,⁴ prepares the assessment rolls listing

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1. A mill is one one-thousandth of a United States dollar, FLA. STAT. § 192.001(10) (Supp. 1982). A rate of 10 mills produces a tax of 1% of the value of the property in the tax base. Although statutes refer to "millages" and "millage rates," the tax rates are to be expressed in dollars and cents per every thousand dollars of assessed property value for purposes of public notice. FLA. STAT. § 200.001(6) (Supp. 1982). For example, a rate of 10 mills is published as a tax of \$10.00 per \$1,000.00 of assessed value.

2. Local governmental bodies must observe procedures and limitations in the setting of millages. FLA. STAT. CH. 200 (Supp. 1982).

3. *E.g.*, land properly qualified as agricultural is valued solely on its agricultural use. FLA. STAT. § 193.461(6)(a) (Supp. 1982).

4. FLA. CONST. art. VII, § 4 (1968) provides in pertinent part: "By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation. . . ." A similar provision appeared in FLA. CONST. art IX, § 1, (1885). The term "just valuation" has been defined as "fair market value," the classic formula being the amount a "purchaser willing but not obliged to buy, would pay to

all real and tangible personal property within his jurisdiction,⁵ and furnishes these rolls to the appropriate taxing authorities.⁶ After the taxing authorities set millage rates,⁷ the property appraiser performs the above described mathematical computation⁸ to determine the amount of ad valorem tax imposed on each item and parcel of taxable property. Finally, the property appraiser certifies the rolls to the tax collector,⁹ who collects the taxes due¹⁰ and distributes the funds to the proper taxing entities.¹¹

The role of the property appraiser has remained essentially the same throughout Florida's history, but at times swirling political currents and shifts in fiscal policy of state and local governments have caused the role to undergo change. From the time of Florida's statehood until 1974 the property appraiser was referred to as the "tax assessor,"¹² but the title was constitutionally changed in that year to

one willing but not obliged to sell." *Root v. Wood*, 155 Fla. 613, 622, 21 So.2d 133, 138 (1945).

5. FLA. STAT. § 193.114 (Supp. 1982).

6. FLA. STAT. § 200.065 (Supp. 1982). The certification provides the taxing authorities a close estimate of the total value of property in the tax base for preparing budgets and determining the millage rate at which the ad valorem tax will be levied. The tax rolls must be submitted to the executive director of the Department of Revenue for review to determine if the rolls meet all requirements relating to form and just value, and for approval or disapproval. *Id.* § 193.1142 (Supp. 1982).

7. The millage rate levied must be provided for in a resolution or ordinance approved according to proper statutory procedure by the governing body of the taxing authority. FLA. STAT. § 200.065(2) (Supp. 1982). A copy of the resolution or ordinance must be furnished to the property appraiser. *Id.* § 200.065(4) (Supp. 1982).

8. This computation is referred to as an extension on the tax roll, *see* FLA. STAT. §§ 192.001(6), 193.122(2) (Supp. 1982), and is purely a ministerial duty. *State ex rel. Neafie v. Board of Comm'rs of Everglades Drainage Dist.*, 139 Fla. 559, 567, 190 So. 712, 716 (1939).

9. FLA. STAT. §§ 193.116(1) (1981), 193.122(1) (Supp. 1982).

10. FLA. STAT. § 197.012 (Supp. 1982).

11. *Id.* § 197.0126(2) (Supp. 1982).

12. 1845 Fla. Laws 23, ch. 10, § 9, provided "[t]hat there shall be an Assessor of the Revenue appointed yearly by the General Assembly, and commissioned by the Governor of this state for each and every county in this state. . . ." References also were made variously to "the Assessor of taxes," *id.* at § 16, and "the County Assessors" *id.* at § 18. The most prevalent title, however, was that of "Tax Assessor" *e.g., id.* at §§ 17, 30, and §§ 9, 10, 11 (in marginal notes). The title of "Tax Assessor" quickly became adopted; the other terms falling into disuse. *See, e.g.,* 1846 Fla. Laws 47, ch. 92;

"property appraiser."¹³ This article will use the two terms in their proper chronological context; while the article discusses the history of the "tax assessor," it should be remembered this character has metamorphosed into the "property appraiser."

The thesis of this article is that the changes in the stage setting upon which the property appraiser plays his role have been of sufficient magnitude to demote the character from the exalted status of an elected, constitutional officer to the more appropriate position of a functionary employee of the Department of Revenue. After more than a century of experience, it is clear that equality and uniformity in ad valorem taxation will not be forthcoming so long as the valuation of property is within the discretionary authority of sixty-seven autonomous property appraisers. Recently, the legislature has dramatically increased the Department of Revenue's supervision and control over property appraisers in a variety of ways, with the laudable objective of securing the valuation of all property at its full cash value in all sixty-seven counties. At the same time, the historical reasons for the local election of property appraisers are no longer timely. It is a sham to ostensibly maintain the independence of property appraisers, while simultaneously prescribing not only the procedures and methods for them to follow in the valuation of property, but also the minutiae of the day-to-day operations of their offices. The time has come to transfer the duties of the property appraiser to the Department of Revenue so that they may be carried out statewide in a more even-handed, straightforward manner on a state-wide basis.

II. History of the Property Appraiser in Florida

A. Early Statehood

The tax assessor was a central figure in tax administration when Florida first became a state. In ad valorem taxation, the term "assessment" refers to the determination of property taxes, and encompasses the processes of *valuing* the taxable property, and *levying* the tax at a particular rate.¹⁴ In the early days of statehood, the most significant ad

1848 Fla. Laws 10, ch. 212, § 1; and 1855 Fla. Laws 8, ch. 715, § 9.

13. H.J. Res. 1907, 1973 Fla. Laws; adopted in the general election of 1974.

14. Jackson Lumber Co. v. McCrimmon, 164 F. 759, 763-64 (M.D. Fla. 1908).

valorem tax was imposed not by local government, but by the state.¹⁵ The legislature typically would enact a law providing for the imposition of a state tax at a certain rate. The owner of taxable property (or his agent) would be required to provide the tax assessor an annual list (commonly referred to as a "return") of the taxable property, with a "description of the situation and quality of the same. . . ."¹⁶ The rate of state tax imposed on various items of property would already be known to the tax assessor, who would be required simply to "state in the last column of his book the total amount of taxes due from such person."¹⁷ The law encouraged the owner to be truthful in valuing his property by requiring certification under oath that his list was complete and accurate.¹⁸ If the list was incomplete or inaccurate, the owner became subject to pay a double tax.¹⁹ The tax assessor, however, was not merely a passive actor, for it was his duty "diligently to seek out and list all the property liable to taxation in his county to the best of his skill and ability."²⁰

As might be expected, property owners tended to act in their economic self-interest, with the value of property listed on a return often being lower than the price which it might bring in the marketplace. In 1858, the Legislature provided that if the tax assessor should "have any doubt of the correctness of any return . . . either as to number or value," he was to bring the matter before the county commissioners who, in turn, were to appoint "three discreet persons to enquire into the correctness of said return or returns . . . and the valuation made by

15. See, e.g., 1845 Fla. Laws 21, ch. 10, § 3 (imposing a state tax upon, *inter alia*, real property located within any town, ville or city, at a rate of ten cents upon every hundred dollars value (one mill)). Counties were required to "levy a county tax . . . upon the same persons and species of property as [were] subject to State tax," *id.* at § 32, and municipalities were "authorized to levy and collect a tax . . . upon all the kinds of property . . . recognised [sic] by [the] act as subjects of State taxation; *Provided*, The tax so assessed and collected . . . [did] not exceed fifty per centum upon the amount of the State Tax," *id.* at § 33.

16. 1845 Fla. Laws 24, ch. 10, § 13.

17. *Id.*

18. *Id.* at § 14.

19. *Id.*

20. *Id.* In 1855 a statute was enacted requiring the tax assessor to certify under oath that all returns submitted to him had been sworn by the taxpayer to be correct. 1855 Fla. Laws —, ch. 715, § 9.

said Commission [would] be deemed and taken as the true assessment in such cases. . . ."²¹

During this period, the state ad valorem tax was a general property tax, imposed on tangible and intangible personal property as well as real property.²² The bulk of the unimproved real property in the state, however, was within the plantation system,²³ and "the value of the slave property in the state exceeded the combined value of every other form of property listed—including land, buildings outside of towns, [and] household furniture."²⁴ Therefore, in practice, the ad valorem tax was imposed primarily on agricultural land and slaves.²⁵

With Florida's participation in the Civil War generating an increased need for revenue, legislation was enacted in 1862 to strengthen the property tax.²⁶ In addition, this legislation shifted the task of valuing property from the tax assessors to the county commissioners.²⁷ This legislation was repealed the next year,²⁸ however, "without reviving any pre-existing law or providing any new method of assessment of *valua-*

21. 1858 Fla. Laws 11, ch. 859, § 1.

22. 1855 Fla. Laws 7, ch. 715, § 2. Florida derived significant state revenue from two other types of taxes: the capitation, or poll tax, *e.g., id.* at § 1 (imposing an annual tax of fifty cents on "every free white male inhabitant of this State, above the age of twenty-one years and under the age of fifty years, except paupers and idiotic and insane persons"); and license taxes, *e.g., id.* at § 6 (imposing a tax of \$200 on Hawkers and Pedlars "for each county in which he or they so hawk and peddle").

23. Edwin L. Williams, Jr., *Florida in the Union, 1845-1861*, at 109 (unpublished doctoral dissertation, University of North Carolina, 1951), *cited in* 1 J. DOVELL, *FLORIDA* 333 n.44 (1952).

24. Williams, *Negro Slavery in Florida*, 28 *FLA. HISTORICAL Q.* 93, 202 (1950), *cited in* 1 J. DOVELL, *FLORIDA* 348 n.104 (1952).

25. E. SELIGMAN, *ESSAYS IN TAXATION* 11, 17 (1925).

26. 1862 Fla. Laws 27, ch. 1,345.

27. [I]t shall be the duty of Tax Assessors and Collectors to make a list of all the taxable property in their respective counties as provided by law, with such statistical facts concerning the same as may be requisite in estimating the value of such taxable property and make a return of the same to the Board of County Commissioners of their respective counties . . . , and the County Commissioners [shall] thereupon proceed to value and assess the taxes on such property as provided in the first section of this Act. . . .

Id. at § 2.

28. 1863 Fla. Laws 25, ch. 1,405, § 3.

tions, but [thereafter] the assessors [were directed] to assess taxes upon all taxable property."²⁹ The apparent hiatus in the law³⁰ was somewhat bridged because the assessor was required to apportion taxes with reference to "equality and uniformity," and he can do this only by making an estimate of the value of property taxed, and apportioning the taxes accordingly."³¹ The property owner thus continued to have the initial task of valuing property for ad valorem taxation, subject to the review and independent judgment of the tax assessor.

B. The Post-Civil War Era

At the conclusion of the Civil War, President Andrew Johnson appointed William Marvin, formerly a federal judge in Key West, to be the provisional governor of Florida.³² Governor Marvin called a convention which was held in Tallahassee in October and November of 1865. The convention annulled the Ordinance of Secession of January 10, 1861,³³ and adopted a new constitution becoming effective on November 7, 1865, without submitting it to the people for ratification.³⁴ The constitution made no provision for tax assessors; the General Assembly was directed to "devise and adopt system of revenue, having regard to an equal and uniform mode of taxation, throughout the State."³⁵ In addition, the constitution authorized counties and municipalities to impose taxes, provided that "all property [was to] be taxed upon the principles established in regard to State taxation."³⁶

In 1867, the Congress expressed its dissatisfaction with the reconstruction efforts of President Johnson by placing Florida and other southern states under martial law and directing the federal military

29. *King v. Gwynn*, 14 Fla. 32, 34 (1871).

30. The hiatus continued with the enactment of 1866 Fla. Laws 65, ch. 1,501.

31. *King*, 14 Fla. at 37 (1871).

32. Proclamation of President Andrew Johnson, July 13, 1865, *cited in* 2 J. DOVELL, FLORIDA 535 (1952).

33. 1865 Fla. Laws 149 Ordinance No. 1.

34. 3 FLA. STAT. HELPFUL AND USEFUL MATTER 163 (1941). Although the franchise was extended only to Floridians subscribing to an amnesty oath, liberal enforcement resulted in a convention whose membership "included a goodly number of the Confederate leaders." 2 J. DOVELL, FLORIDA 537 (1952).

35. FLA. CONST. art. VIII, § 1 (1865).

36. FLA. CONST. art. VIII, § 4 (1865).

authorities to oversee a new constitutional convention.³⁷ This convention was a tumultuous affair,³⁸ first having met in January, 1868, with a constitution ultimately being adopted on February 25, 1868, and ratified by the people at an election held May 4, 1868. This constitution was modeled after the constitutions of mid-western states in force at the time,³⁹ with one unusual provision—the product of compromise—which called for virtually all state and local executive offices to be filled by gubernatorial appointment rather than by election.⁴⁰ The “assessor of taxes” for each county was among the officers to be appointed.⁴¹

During the next fifteen years, the political forces which initially had been swept from power as a consequence of martial law⁴² were able to regroup and regain their influence. In 1884, Brigadier-General Edward A. Perry, a Democrat and Confederate War hero, was elected

37. Act of March 2, 1867, 14 Stat. 428. Congress was disturbed by steps taken in Florida and other southern states to keep blacks disenfranchised and treated as second-class citizens. The crowning blow was the rejection of the fourteenth amendment by all of the old Confederate states except Tennessee (Florida's legislature having rejected it unanimously). It was necessary for the Congress to override President Johnson's veto in order to enact the reconstruction bill. 2 J. DOVELL, FLORIDA 539-40, 548 (1952).

38. See 2 J. DOVELL, FLORIDA 550-57 (1952).

39. 2 J. DOVELL, FLORIDA 555 (1952).

40. “The executive appointment compromise had been accepted as a means toward white supremacy in ‘black belt’ counties during the period of Republican rule.” *Id.* at 651.

41. FLA. CONST. art. V, § 19 (1868) provided:

The Governor shall appoint, by and with the consent of the Senate, in each county an assessor of taxes and a collector of revenue, whose duties shall be prescribed by law, and who shall hold their offices for two years, and be subject to removal upon the recommendation of the Governor and consent of the Senate.

42. The ex-Confederates and Democrats who held power under the administration of Provisional Governor Marvin in the mid-1860's were replaced during the martial law period by Republicans and “carpetbaggers.” The elections held in May, 1868, produced a Republican Governor, Lieutenant Governor and Representative to Congress. The Florida Legislature was comprised of sixteen Republicans in the senate and thirty-seven in the house; there were only eight Democrats in the senate and fifteen in the house. Martial law was lifted on July 4, 1868, and on July 25 of that year the Congress readmitted Florida into the Union. 2 J. DOVELL, FLORIDA 556-64 (1952).

Governor.⁴³ At the same election, voters overwhelmingly supported a proposal for a constitutional convention to overhaul the 1868 constitution.⁴⁴ There were many issues involved, but the gubernatorial power to appoint practically all state and county officials was of paramount concern to the populace.⁴⁵ The constitution, which was adopted by the convention in 1885,⁴⁶ returned selection of most local officials to the voters of the jurisdiction.⁴⁷

The constitution granted the tax assessor the stature of a "constitutional officer,"⁴⁸ but did not change the duties and powers of the office.⁴⁹ The preceding thirty years had seen a gradual shift of responsibility from the property owner to the tax assessor in the valuation of property. As an example, legislation enacted in 1855 required owners to submit to the tax assessor, under oath, a list of real, or tangible or intangible personal property subject to taxation.⁵⁰ The tax assessor had

43. *Id.* at 647-49.

44. *Id.* at 594, 650; 1883 Fla. Laws 169, J. Res. No. 1 (resolution calling for referendum on a constitutional convention).

45. 2 J. DOVELL, FLORIDA 651 (1952).

46. The constitution was submitted for ratification in the general election of 1886, and became effective on January 1, 1887. Ordinance No. 1 of the Constitutional Convention of 1885.

47. FLA. CONST. art. VIII, § 6 (1885) provided: "The Legislature shall provide for the election by the qualified electors in each county of the following County Officers: A Clerk of the Circuit Court, a Sheriff, Constables, a County Assessor of Taxes, a Tax Collector, a County Treasurer, a Superintendent of Public Instruction and a County Surveyor." Curiously, county commissioners continued to be appointed by the Governor. *Id.* § 5. The appointment of the commissioners was a promised compromise protection to the 'black belt' counties whereby a Democratic governor could select Democratic officeholders. A further protection was secured in the requirement that county officeholders were to give surety bond and be commissioned by the governor. Bonds were made subject to the approval of the county commissioners and the state comptroller. 2 J. DOVELL, FLORIDA 656 (1952). In 1900, the 1885 constitution was amended to provide for the election of county commissioners. 1899 Fla. Laws S.J.Res. No. 44.

48. The status is of uncertain importance. *Compare* District School Bd. of Lee County v. Askew, 278 So. 2d 272, 275 (Fla. 1973) ("tax assessors are constitutionally created officers"), *with* Department of Revenue v. Markham, 396 So. 2d 1120, 1121 (Fla. 1981) (property appraisers, i.e. tax assessors, are governmental officials bound by statutory duty).

49. *See* 1887 Fla. Laws 9-11, ch. 3,681, §§ 15-22.

50. 1855 Fla. Laws 8, ch. 715, § 9.

no power to initiate the valuation process. In 1858, the tax assessor was directed to notify the county commissioners of any perceived instance of undervaluation, and with respect to all other property on the assessment roll, to give oath that "he verily believe[d] that the said property ha[d] been returned at its true value."⁵¹ The commission would determine the value of property it found to have been undervalued.⁵²

In 1874, legislation was passed eliminating the owner's determination of value of *real* property, requiring "the assessor [to] visit and inspect all real estate before he affixe[d] a valuation thereon, unless he [was] previously personally acquainted with its value."⁵³ The owner continued to return under oath and specify the value of personalty.⁵⁴ The tax assessor was not authorized to determine the value of personalty independently, unless the owner either failed to make a return, or failed or refused to "make oath before [the tax assessor] that the [return was] full and correct."⁵⁵

Five years later, the legislature again changed the relationship between the property owner and the tax assessor. This time, the property owner was required to submit not only a return of personalty, but of real property, including "a statement of the value of each parcel of land."⁵⁶ The tax assessor's duty was to "call to the attention of the Board of County Commissioners . . . all cases in which property [was], in his judgment, . . . assessed below its cash value;"⁵⁷ and the Board was authorized to "raise or lower the valuation of any real or personal property."⁵⁸ In 1881, there was another change again obliging the tax assessor to visit each parcel of real property and determine its value.⁵⁹ Personalty was still returned, under oath, by its owner;⁶⁰ the tax assessor became involved only if no return was filed, or if the return was

51. 1858 Fla. Laws 12, ch. 859, § 2.

52. *Id.* at § 1.

53. 1874 Fla. Laws 14, ch. 1,976, § 17.

54. *Id.* at § 24.

55. *Id.* at §§ 24-26.

56. 1879 Fla. Laws 24, ch. 3,099, § 24.

57. *Id.* at § 26.

58. *Id.* at § 29.

59. 1881 Fla. Laws 28, 29, ch. 3,219, §§ 17, 24.

60. *Id.* at § 24.

not properly made under oath.⁶¹ This last change in valuation of realty and personalty was to remain basically the same up to the present.⁶²

C. The First Attempts at State Oversight of Tax Assessors

Over the years, the tax assessor has been accorded a great deal of discretion in valuing property for taxation;⁶³ however, this discretion has not been unbridled or total. Beginning in 1869, the Board of County Commissioners was required to meet with the tax assessor on or before the first Monday of June in each year, in order to review the assessment rolls.⁶⁴ Subsequently,

[t]he county commissioners of each county shall meet at the clerk's office on the first Monday of June of each year, for the purpose of equalizing the assessment of the real estate of their respective counties, and to hear all persons who may be aggrieved, and the board of county commissioners may alter the valuation of any real estate.⁶⁵

The "equalization" process authorized to the county commissioners was restricted jurisdictionally to the valuations of property within the commissioner's county. The board was unconcerned, for example, that farmland might be valued at \$1.00 an acre in its county, and contiguous farmland lying in an adjacent county might be valued at \$5.00 an acre—even though both parcels were subject to the same rate of state ad valorem tax. Instead, the board's primary concern was ensuring that the ad valorem tax imposed by the county was distributed *inter se* in a uniform and equal manner. This aim could be accomplished whether the valuation of property was at full price or some fraction of the price which it could bring in the marketplace ("cash value").⁶⁶ With local officials deciding the amount of revenue desired from the ad valorem tax, and levying the tax at the highest rate (millage) author-

61. *Id.* at § 25.

62. *See* FLA. STAT. § 193.052 (Supp. 1982).

63. *German-American Lumber Co. v. Barbee*, 59 Fla. 493, 52 So. 292 (1910).

64. 1869 Fla. Laws 11, ch. 1,713, § 27.

65. *Id.* at § 28.

66. "Cash value" was defined "to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment." *Id.* at § 5.

ized, they could adjust downward (equalize?) the valuation of taxable property without regard to full cash value.⁶⁷ Indeed, keeping the valuations low worked to the advantage of the property owners and electors within the board's county, because that correspondingly lowered the amount of the state imposed ad valorem tax.⁶⁸

This antagonism between state and local tax objectives produced a vicious cycle. The state would increase the state ad valorem tax rate, while the local officials reduced the local valuations of property which thereby eroded the tax base available to the state. In 1877, the state ad valorem tax rate reached twelve and one half mills,⁶⁹ and yet revenues were less than expected. When the legislature rebuffed the governor's request to reduce the millage, he acted by executive orders to reduce the 1877 millage to ten, and the 1878 millage to nine.⁷⁰ In 1879, apparently following the governor's previous examples, the legislature further reduced the millage to seven and also suspended the levy for the redemption of bonded indebtedness.⁷¹ This reduction caused state ad valorem tax receipts to fall far short of necessary revenues, even as the governor was recommending state-wide uniformity of taxation.⁷² Subsequent decreases (after a brief increase) in the state millage rate during the early 1880's were accompanied by increases in the assessed valuation of taxable property.⁷³

By 1913, the state ad valorem tax rate had fallen to a relatively moderate two mills,⁷⁴ and yet the vexatious problem of undervaluation persisted. In that year, the legislature took the first step leading to state

67. Significantly, the board of county commissioners would establish the rate of the county levy at the same meeting which was required to be held for the purpose of equalizing assessments. *Id.* at § 38.

68. It had long been noted that "the utilization for general state purposes of a locally assessed tax on property inevitably leads to an under-assessment of the property." E. SELIGMAN, *ESSAYS IN TAXATION* 666 (10th ed. 1925).

69. 2 J. DOVELL, *FLORIDA* 590 (1952).

70. *Id.*

71. 1879 Fla. Laws 39, ch. 3,100, §§ 2, 3.

72. 2 J. DOVELL, *FLORIDA* 590-91 (1952).

73. *Id.* at 593. However, it should be noted that a major factor, in both the increase in total assessed valuations and in the ability to reduce the millage rate, was the success in finally bringing railroad property into the tax base. *Id.* at 594.

74. 1913 Fla. Laws 280-81, ch. 6,474, § 1. In addition to the levy for state governmental purposes, there was a school tax levied at a state-wide rate of one mill.

regulation of the ad valorem taxing process by creating a state Tax Commission, whose primary duty was

[t]o have and exercise general supervision over the administration of the tax laws of the State, over Assessors, and over Boards of County Commissioners in the performance of their duties as boards of tax equalization, to the end that all assessments of property be made relatively just and equal at the true and substantial value in compliance with law.⁷⁵

And yet, the Tax Commission was a rather toothless watchdog posted as sentry over the tax assessors and boards of county commissioners. It had not been empowered to make or force changes in the valuation of property made by the tax assessors or county commissioners, even though such action might have been necessary to fulfill the mission of the Commission.⁷⁶

Because the enabling legislation creating the Tax Commission was not passed until June of 1913, the Commission was not able to actively oversee the assessment process for that year. The Commissioners, however, did spend time traveling throughout the state, observing and learning about the status of ad valorem taxation in the state.⁷⁷ The Tax Commission's first step in corrective action was the call for a convention of tax assessors for the purposes of having

75. 1913 Fla. Laws. 329-31, ch. 6,500, § 9.

76. The Tax Commission requested that it be given such authority, but the legislature failed to act affirmatively. The Commission also recommended the adoption of an income tax and an inheritance tax so that the state's reliance on the ad valorem property tax could be reduced. TAX COMMISSION, FIRST BIENNIAL REPORT 35-36 (1915).

77. Through these investigations we found the conditions to be extremely bad, everything in the matter of taxation and values being in chaos. We found no two counties assessing property on the same basis of valuation; we found great inequalities even among the same classes of property in the same county; the per centage of values ranged from as low as ten per cent of true value to full cash value; and great quantities of property were not even on the tax books. This condition existed in the face of the fact that the law is plain and emphatic that all property shall be assessed at true cash value or full cash value.

Id. at 12.

the assessors confer among themselves and to discuss with the Tax Commission and one another steps to get the property on an equal basis in the State and to discuss the necessary steps to be taken to improve the tax conditions in Florida; it was the desire of the Tax Commission that the Assessors get together and agree on a definite percentage of true value upon which all the assessors in the State would agree to value the property in Florida for the year 1914, so that a step toward equalization might be taken and something in that direction begun to be accomplished.⁷⁸

By the Tax Commission's own admission, the convention was not a success: "[T]he Assessors adjourned the convention, or rather went away before the convention had completed its work, without taking any action in regard to uniform valuation for assessment and the convention then seemed to be a failure and the efforts of the Commission to have come to nothing."⁷⁹

Because the Tax Commission was unable to persuade the tax assessors to agree to value property at some uniform percentage of full cash value, the Commission believed it was left with no choice but to instruct the assessors to comply with the law "and assess all property at its full cash value."⁸⁰ The tax assessors met again a few months later and this time adopted a resolution agreeing to value real estate "at fifty per cent of its true cash value, leaving the true cash value with the discretion of the Assessor of his county."⁸¹ The Tax Commission accepted this compromise, acknowledging that "[t]his was in violation of law, but was done by custom and consent among the Assessors."⁸²

Even though fifty per cent and not full cash value was used, valuations rose dramatically. In 1914, real property valuations increased almost twenty-five per cent and personal property valuations increased twenty-one per cent over what they were in 1913.⁸³ As a consequence, state ad valorem levies were reduced by two mills.⁸⁴ It is significant that this progress was achieved without infringing upon the tax as-

78. *Id.* at 15.

79. *Id.* at 16.

80. *Id.* at 19.

81. *Id.* at 21.

82. *Id.*

83. *Id.* at 165.

84. *Id.* at 32.

essor's discretion in valuing property.

Instead of accepting the Tax Commission's suggestions for strengthening its powers and authority to have property assessed at its full cash value throughout the state,⁸⁵ the legislature abolished the Tax Commission in 1918.⁸⁶ Three years later, however, many of the duties and functions which the three person Tax Commission had performed were given to a single individual, the State Equalizer of Taxes.⁸⁷ The State Equalizer was authorized to examine the tax assessment rolls throughout the state, and

[i]f it shall appear to said Equalizer that in any one or more of the counties of this State the taxable values fixed upon any one or more classes of property are not uniform with the values fixed upon the same classes of property in other counties, the said Equalizer shall investigate and inquire as to the reason therefor, and, after making such investigation and comparison, shall have authority to point out to the County Assessor of Taxes such inequalities and direct the said Assessor to adjust, equalize and assess the same in accordance with the findings of the said Equalizer as to what would be an equitable assessment, either by adding a fixed per centum to the county valuation of any classe [sic] of property in any county, if he finds the county valuation is too low, or by deducting a fixed per centum from the county valuation if he finds the county valuation is too high, as may appear to be just and right between the counties; or to raise or lower the valuations and assessments of any or all classes of property in the State in order to more equally make each class of property bear its just proportion of taxation.⁸⁸

The State Equalizer, however, did not have the final word. If the Board of County Commissioners was dissatisfied with the changes ordered by the State Equalizer, it could appeal to the State Board of Equalizers, comprised of the Governor, the Treasurer and the Attorney General.⁸⁹ It is unclear how well this scheme worked;⁹⁰ it was repealed

85. *Id.* at 34-35.

86. 1918 Fla. Laws 65, ch. 7,751.

87. 1921 Fla. Laws 403, 406-07, ch. 8,584 §§ 6, 7.

88. *Id.* at § 3.

89. 1921 Fla. Laws 405-06, ch. 8,584, § 5.

90. There were no reported decisions under this act regarding the duties of the

in 1931⁹¹ and for a period thereafter the tax assessors exercised their discretion in valuing property for taxation without any meaningful review or control from the state.

D. The Tax Assessor's Discretion in Valuation

Throughout this period, the discretion of the tax assessor in valuing property appeared virtually sacrosanct. The Florida Supreme Court, in first addressing the issue of discretion, held that a circuit court judge exceeded his authority in reviewing the assessor's discretionary judgment of the value of property determined for purposes of taxation.⁹² In *German-American Lumber Co. v. Barbee*,⁹³ the plaintiff asserted that the value placed on its property by the tax assessor was excessive. The court noted that the plaintiff had not complained to the board of county commissioners, sitting as the board of equalizers, which had the power to reduce the assessor's valuation if found excessive.⁹⁴ The parameters of judicial review of the tax assessor's valuation of property were summarized as follows:

The law contemplates that a wide discretion be accorded to the tax assessor in the valuation of property for the purposes of taxation. In the absence of a clear and positive showing of fraud or of an illegal act or of an abuse of discretion rendering an assessment authorized by law so arbitrary and discriminating as to amount to a fraud upon a taxpayer or to a denial of the equal protection of the laws, the courts will not in general control the discretion of the tax assessor in making valuations for taxing purposes. The burdens of

State Equalizer of Taxes and his supervision by the Board of Equalizers of the State. In *State v. State Bd. of Equalizers*, 84 Fla. 592, 94 So. 681 (1922), the court fended off an attack on 1921 Fla. Laws 406-07, §§ 6 and 7 which authorized the State Comptroller, rather than the county tax assessors, to value certain railroad and telegraph property, and the Board of Equalizers to review such valuations.

91. 1931 Fla. Laws 940, ch. 15,027.

92. *Shear v. County Comm'rs of Columbia County*, 14 Fla. 146 (1872). The valuation subject to review in that case had been made by the board of county commissioners rather than the tax assessor. However, the court's discussion regarding the judicial review of executive discretion is germane.

93. 59 Fla. 493, 52 So. 292 (1910).

94. *Id.* at 497-98, 52 So. at 294.

taxation cannot be made exactly equal.⁹⁵

In *Graham v. City of West Tampa*,⁹⁶ the taxpayer asserted that the value set for his land by the assessor was not only excessive, but had been arbitrarily and intentionally made.⁹⁷ The Court, holding that the jurisdiction of the circuit court was proper, noted that

[w]hile the law accords a range of discretion to the officer authorized to ascertain and determine valuations of property for purposes of taxation, when the officer proceeds in accordance with and substantially complies with the requirements of law designed to ascertain such values, yet, if the steps required to be taken in making valuations are not in fact and in good faith actually taken, and the valuations are shown to be essentially unjust or unequal abstractly or relatively, the assessment is invalid. Valuations of property for taxation must be ascertained in the manner required by law and must have relation to the actual value of the property; and there must be no substantial inequality in valuations.⁹⁸

Again in *Camp Phosphate Co. v. Allen*,⁹⁹ the taxpayer demonstrated that the excessive valuation of his property resulted from the assessor's arbitrary and discriminatory actions, so that the circuit court properly had jurisdiction to review the assessor's exercise of discretion in valuation.¹⁰⁰

95. *Id. Accord Wade v. Murrhee*, 75 Fla. 494, 78 So. 536 (1918); *City of Tampa v. Kaunitz*, 39 Fla. 683, 23 So. 416 (1898).

96. 71 Fla. 605, 71 So. 926 (1916).

97. *Id.* at 607, 71 So. at 926.

98. *Id.* at 611-12, 71 So. at 927-28.

99. 77 Fla. 341, 81 So. 503 (1919).

100. The Court noted that the board of county commissioners had approved the tax assessor's improprieties:

The law does not contemplate that the assessor is infallible nor that his valuations shall be conclusive, but presumes that he will err, and provides the means for correcting his errors and equalizing his values by statute which requires the commissioners to give notice by publication or posting of the time when the board will be in session to have complaints and receive testimony as to values of any property as fixed by the assessor, and, after hearing testimony, to raise or lower such values, that the assessment may be equal and uniform. The board of county commissioners in this state is an essential part of the taxing system, their duties as such are

Finally, in *City of Tampa v. Palmer*,¹⁰¹ the court “held mistaken judgment, and unaffected by any element of illegality in matter of law, or intentional or other abuse of authority, or fraud, express or implied, will not suffice as a ground of equitable jurisdiction.”¹⁰²

Although the tax assessor was accorded wide discretion in valuing property, he was bound by the constitutional directive, appearing first in the 1868 constitution, to value property at its “full cash value.”¹⁰³ “The Legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal. . . .”¹⁰⁴

E. Just Valuation vs. Equal Valuation

If a property owner could show that he had not been treated *equally*—that his property had been determined to have a higher value than similar property—then the emphasis would be focused on equalizing the two values, rather than on ensuring each property was valued at “full cash value.” The Board of County Commissioners was empowered to change the assessor’s valuation of a parcel of property in order to equalize the valuation of the same class of property within the county.¹⁰⁵ Therefore the Tax Commission did not feel bound by the “full cash value” requirement when directing tax assessors to value

prescribed by law, and when the members of that board, sitting as a board of equalizers, deliberately, intentionally, and arbitrarily sustain an assessment which they know is unjust, unequal, and discriminatory, they perpetuate a fraud upon the injured taxpayers.

Id. at 363-64, 81 So. at 511.

101. 89 Fla. 514, 105 So. 115 (1925).

102. *Id.* at 529-30, 105 So. at 120.

103. *E.g.*, 1881 Fla. Laws 28-29, ch. 3,219, § 18. “Cash value” was defined “to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment.” *Id.* at § 5.

104. FLA. CONST. art. XII, § 1 (1868). Earlier constitutions had been silent regarding the valuation of property for taxation. FLA. CONST. art. VIII, § 1 (1861), merely provided that “[t]he General Assembly shall devise and adopt a system of revenue, having regard to an equal and uniform mode of taxation to be general throughout the State.” Identical language appeared in FLA. CONST. art. VIII, § 1 (1838). The “just valuation” provision was retained in FLA. CONST. art. IX, § 1 (1885), and is currently contained in FLA. CONST. art. VII, § 4 (1968).

105. *E.g.*, 1881 Fla. Laws 30, ch. 3,219, § 28.

property at fifty per cent of actual value.¹⁰⁶ Nor were courts bound when confronted with valuations clearly less than full cash value:

The purpose of the statute in requiring property to be assessed at its full cash value is to secure uniformity and equality of burden upon all property in the state, and if all the taxable property of Citrus county was assessed on a basis of 50 per cent. of its true cash value, the purpose of the constitutional provision has not been defeated, nor has the appellant been injured. . . .

The adoption of full value has no different effect in distributing the burden than would be gained by adopting 75 per cent., or 50 per cent., or even 10 per cent., as the basis, so long as either was applied uniformly. The only difference would be that, supposing the requirements of the treasury remained constant, the rate of taxation would have to be increased as the percentage of valuation was reduced. Therefore the principal, if not the sole reason for adopting "full cash value" as the standard for valuations is as a convenient means to an end; the end being equal taxation.¹⁰⁷

However, even as the above quoted passage was being penned, seeds had already been planted which would disrupt the status quo of allowing property to be valued at something less than full cash value, so long as all property within a county was valued at the same percentage of full value. Those seeds were constitutionally authorized exemptions from ad valorem taxation for certain property—exemptions expressed in terms of flat dollar amounts. First, the constitution adopted in 1885 provided that "[t]here shall be exempt from taxation property to the value of two hundred dollars to every widow that has a family dependent on her for support, and to every person that has lost a limb or been disabled in war or by misfortune."¹⁰⁸ This exemption apparently did not significantly affect the distributive burden of the ad

106. See *supra*, discussion of the Tax Commission, text and note 75.

107. *Camp Phosphate Co. v. Allen*, 77 Fla. 341, 349, 81 So. 503, 506 (1919). The Court noted that the valuations had been made at 50 per cent of the full cash value pursuant to instructions from the Tax Commission. *Id.* at 347, 81 So. at 505. The approach of favoring equality and uniformity over full valuation was found in other jurisdictions as well. See, e.g., *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923).

108. FLA. CONST. art. IX, § 9 (1885).

valorem tax because there are no reported decisions addressing it. In 1924, the Constitution was amended to provide:

No tax upon inheritances or upon the income of residents or citizens of this State shall be levied by the State of Florida, or under its authority, *and there shall be exempt from taxation to the head of a family residing in this State, household goods and personal effects to the value of Five Hundred (\$500.00) Dollars.*¹⁰⁹

The effect of this exemption, obviously of more widespread utility than the earlier exemption for widows and certain disabled individuals, was to exacerbate deviations from valuations at other than full cash value. The Court, although noting this effect in *Hackney v. McPenney*,¹¹⁰ concluded:

In this case the taxing unit is the county; and, if all taxable property in the county is assessed at the same percentage of its true cash value and such assessment operates to "secure a just valuation of all property" for taxation, within the meaning of the Constitution, the court will not adjudge the assessment to be void; there being no showing by proper parties that the rule of valuation adopted and applied throughout the county would be illegal if not uniformly applied in a larger taxing unit which includes the county.¹¹¹

The plaintiff in *Hackney* obviously had not raised the point that

109. FLA. CONST. art. IX, § 11 (1885), as amended in the general election of 1924 (emphasis supplied); S.J. Res. 135, 1923 Fla. Laws 483.

110. The court observed:

The organic provision means that, in making assessments of personal property for taxation, the head of a family residing in this state shall be allowed an exemption of "household goods and personal effects to the value of five hundred dollars"; such value of \$500 to be deducted from the total assessable value of the household goods and personal effects of the head of a family residing in this state. For example, if the head of a family residing in this state has "household goods and personal effects" of the value of \$1,200 and the assessment value is 50 per cent. thereof, or \$600, the exempt value of \$500 is to be deducted from the \$600 assessment value, leaving the remainder of \$100 to be assessed for taxation.

113 Fla. 176, 188-89, 151 So. 524, 529 (1933).

111. *Id.* at 193, 151 So. at 530 (on petition for rehearing).

the state was also levying at a uniform state-wide rate an ad valorem tax on the assessed value of (*inter alia*) household goods and personal effects in excess of five hundred dollars belong to resident heads-of-household.¹¹² If valuations in all counties were at a uniform fifty per cent of full cash value, no unequal treatment would be imposed with the constitutional school tax of one mill. However, if, for example, property were valued at fifty per cent in one county, but only twenty-five per cent in another, identical household goods and personal effects with a full cash value of \$1,200 after application of this exemption would result in \$100 assessed for taxation in the first county, and none in the second.¹¹³ It seems likely that the relatively small dollar amount of this exemption kept the issue from being brought before the courts.¹¹⁴

In 1934, the constitution was amended, adopting the homestead tax exemption and thereby ending the era of complacency with valuations at less than full cash value:

There shall be exempted from all taxation, other than special assessments for benefits, to every head of a family who is a citizen of and resides in the State of Florida, the homestead as defined in Article X of the Constitution of the State of Florida up to the valuation of \$5,000.00; provided, however, that the title to said home-

112. The tax year before the Court in the *Hackney* case was 1932. In 1931, the legislature resolved to reduce the state's reliance on ad valorem taxation of real and tangible personal property by turning to some alternative tax sources, such as an inheritance tax (adopted by ch. 15,746), an excise tax on documents (ch. 15,787), an additional tax on gasoline (ch. 15,788), and an intangibles tax (ch. 15, 789). In 1929, the legislature had levied state ad valorem taxes on real and tangible personal property at a rate of eight mills for general revenue purposes, one-half mill for the state board of health, one and one-quarter mills for the state prison fund, and one mill for schools, ch. 14,578, § 1, Laws of Fla. 1126-27 (1929). By comparison, in 1931 only the one mill for school purposes was levied, as was then required by article XII, section 6 of the Florida Constitution (1885) (repealed in 1940).

113. At the time of the *Hackney* decision, *supra* note 110, in 1932, the revenue derived from the state-wide constitutional school tax of one mill was distributed "among the several counties of the State in proportion to the average attendance upon schools in the said counties respectively." FLA. CONST. art. XII, § 7 (1885) (as amended in 1894).

114. The constitutional school tax of one mill, if imposed on property of a taxable value of five hundred dollars, would produce a tax liability of only fifty cents.

stead may be vested in such head of a family or in his lawful wife residing upon such homestead or in both.¹¹⁵

The dollar amount of the homestead tax exemption was not *de minimus*—in many situations it had the effect of completely removing tax liability from a homestead.¹¹⁶ The unfairness of valuations at less than full cash value became apparent on both a statewide and county level. If county valuations were uniform at fifty per cent of full value, homestead property with a full value of \$10,000 would bear no tax while non-homestead property of equal value would be taxable. If, on the other hand, the valuations were at full cash value, both the homestead and non-homestead property would shoulder some portion of the tax burden. The unfairness resulting from discrepancies in valuations between counties, described above in the context of the household goods exemption, was exacerbated by an exemption 1,000 per cent greater in amount. The court in *Cosen Investment Co. v. Overstreet*¹¹⁷ addressed these issues:

Appellant relies upon our opinion, *Camp Phosphate Co. v. Allen*, 77 Fla. 341, 81 So. 503. This case does not support appellant because, as was pointed out there, the purpose of the law was to render the tax burden uniform, equal and just and if all property was assessed at fifty per cent of its cash value the purpose of the law was carried out. Such logic is not now tenable because, by the adoption of Art. X, Sec. 7, to the Florida Constitution, homesteads to the extent of \$5,000 are exempt from taxation.

To perpetuate the practice of assessing all property at a less percentage than [full cash value] would necessarily result in favoring the homesteads. The logic of the opinion in *Camp Phosphate Co. v. Allen*, *supra*, is no longer applicable because the reduced

115. FLA. CONST. art. X, § 7 (1885), added in general election 1934; amended general election 1938 and 1964. The homestead tax exemption is contained today in FLA. CONST. art. VII, § 6 (1968).

116. See *Lersch v. Board of Public Instruction for Orange County*, 121 Fla. 621, 164 So. 281 (1935); *Schleman v. Connecticut General Life Ins. Co.*, 9 So. 2d 197 (Fla. 1942); and Note, *Assessment Standards and Property Tax Equity in Florida*, 17 U. FLA. L. REV. 83 (1964). The exemption was not applicable to the extent ad valorem taxes had been pledged for the payment of interest and principal on bonded indebtedness incurred prior to the adoption of the homestead tax exemption. *State v. Boring*, 121 Fla. 781, 164 So. 859 (1935).

117. 17 So. 2d 788 (Fla. 1944).

value, even though uniformly lower, is no longer just. . . .¹¹⁸

It was no longer possible simply to note that tax assessors had "wide discretion", or to uphold valuations based on discretion if the board of county commissioners properly equalized assessments within a county. Steps were needed to encourage, if not force, the tax assessor to raise the level of valuations to "full cash value" because political disincentives still existed impeding him doing so voluntarily. The tax assessor was an elected official. A voter who understood that the ad valorem tax imposed on his property was not only a function of the valuation made by the assessor, but of the millage levied by the taxing authorities, might nonetheless focus on the clear and direct relationship between an increase in value placed on his property by the assessor and the amount of tax he had to pay. The tax assessor thus was placed in a situation where judicious exercise of his "wide discretion" could improve, if not ensure, the likelihood of his re-election.¹¹⁹

F. The Drive Towards "Full Cash Value" = Restrictions on Discretion

Recognizing the unfairness resulting from undervaluations, and taking effective steps producing "full cash value" valuations of property are two very different things.¹²⁰ Nonetheless, one inducement for local officials to provide low valuations of property¹²¹ was removed with the 1940 constitutional amendment prohibiting the state from imposing ad valorem taxes on real property and tangible personal property.¹²² In

118. *Id.* at 788.

119. In *Dickinson v. Geraci*, 190 So. 2d 368 (Fla. 2d Dist. Ct. App. 1966) the court noted: "We think we can take judicial notice that in the past most Tax Assessors knew the people of their county looked favorably on low ratios of assessment, and this would redound favorably in the Tax Assessors' election returns." *Id.* at 385 (quoting *Glynn v. McNayr*, 133 So. 2d 312 (Fla. 1961)).

120. The Court in *Cosen*, 17 So. 2d 788 (1944), was willing to assume that property was being valued at full cash value: "Subsequent to the adoption of Art. X, Sec. 7, the practice of assessing property has been in conformity with the statute, that is at one hundred per cent of its true cash value." *Id.* at 788.

121. See *supra* note 68 and accompanying text.

122. FLA. CONST. art. IX, § 2 (1885), was amended in the general election of 1940, S.J. Res. 69, 1939 Fla. Laws 1651, to add the phrase: "but after December 31st,

addition, the assessor was provided an incentive to value property at full cash value with enactment of legislation in 1941 requiring local taxing authorities to reduce, or "roll-back," their millage levies in proportion to the increase in the level of valuations made by the tax assessor.¹²³ In theory, property owners no longer should have expected to find their tax liabilities rise with a rise in the valuation of their property because increased valuation accompanied a decrease in the tax rate. Therefore, a tax assessor could feel free to value property at "full cash value" because the onus of determining the amount of taxes had shifted to the proper taxing authorities.¹²⁴

Also in 1941, the legislature enacted legislation to provide increased state control of ad valorem taxation.¹²⁵ The state comptroller was given "general supervision of the assessment and valuation of property so that all property [would] be placed on the tax rolls and the valuation thereof [would] be uniform and equal, as required by the Constitution. . . ."¹²⁶ In furthering this general objective, the legislation required the comptroller to provide all necessary forms for tax assessors;¹²⁷ granted the comptroller power to review assessors' budgets;¹²⁸ directed the comptroller to investigate the conduct and performance of tax officials' duties for recommendation to the governor the removal of any derelict official for "willful failure to properly perform" his duties;¹²⁹ and authorized the comptroller to approve each assessment roll before being submitted to the local taxing authorities for

A.D. 1940, no levy of ad valorem taxes upon real or personal property except intangible property, shall be made for any State purpose whatsoever. . . ." The same amendment repealed the constitutional state-wide school millage required by FLA. CONST. art. XII, § 6 (1885), *see supra* note 112 and accompanying text.

123. 1941 Fla. Laws 1965-66, ch. 20,722, § 54.

124. The defect of this scheme was that it compared the total value of property on the assessment roll with the millage to be levied. It was later noted, although in a different context, that "the mere fact that the aggregate total valuation of a tax roll reflects the full cash value of all property in the county, does not necessarily lead to the conclusion that the roll is equal and that just valuations have been obtained for each separate parcel." *State ex rel. Glynn v. McNayr*, 138 So. 2d 312, 316 (Fla. 1961).

125. 1941 Fla. Laws 1934, ch. 20,722.

126. *Id.* at 1962-63, § 46.

127. *Id.* at 1962.

128. *Id.* at 1966-67, § 56.

129. *Id.* at 1967.

use in levying their respective ad valorem taxes.¹³⁰

Unfortunately, the comptroller's extended grant of authority to effectuate full valuation proved to be insufficient because the tax assessor still had "wide discretion" in valuing property.¹³¹ The county board of equalizers, however, was empowered to disturb the assessor's discretion in order to equalize the valuations of property within the county.¹³² In addition, the comptroller had the authority, in proper circumstances and under the supervision of the State Budget Commission, to direct an assessor to make "a complete re-evaluation and re-assessment of a tax roll."¹³³ Yet, assessments at "full cash value" remained the exception, not the rule.¹³⁴

Since 1941, quickening legislative action has been steadily been directed toward the fundamental source of the problem of undervaluation—the assessor's discretion in determining just value. In 1957, the legislature partially limited this discretion by requiring land used for "agricultural purposes" to be valued on a per acre basis.¹³⁵ In 1963,

130. *Id.* at 1937-38, § 5.

131. *State ex rel. Kent Corp. v. Board of County Comm'rs of Broward County*, 37 So. 2d 252 (Fla. 1948). The valuation made by the tax assessor was presumed to be correct, and would be struck down only if "affirmatively overcome by appropriate and sufficient allegations and proofs excluding every reasonable hypothesis of a legal assessment." *Folsom v. Bank of Greenwood*, 97 Fla. 426, 430, 120 So. 317, 318 (1929).

132. *Sanders v. Crapps*, 45 So. 2d 484 (Fla. 1950). *Compare Sanders v. State ex rel. Shamrock Properties*, 46 So. 2d 491 (Fla. 1950) (board of county commissioners, sitting as a board of equalization, did not have power to reduce valuations placed upon personal property by tax assessor when return of property owner did not specify such personal property under oath). Indeed, there was a presumption that the board of equalization would correct any overvaluation if properly brought before the board. *City of Tampa v. Palmer*, 89 Fla. 514, 531, 105 So. 115, 121 (1925).

133. *Burns v. Butscher*, 187 So. 2d 594 (Fla. 1965).

134. A 1965 survey made by the Railroad Assessment Board, which determined the value of railroad property throughout the state, noted that in eight counties valuations were 100 per cent of full cash value, but in the other 59 counties, valuations ranged down to a low of 17.54 per cent. *Id.* at 595.

In *Blumberg v. Petteway*, 91 So. 2d 297, 298 (Fla. 1956), the tax assessor "testified point blank that he had not assessed the property on the basis of its full cash value, but that he had attempted to take 'a happy medium' between the low of 1932 and the high of 1952. When asked if the City Charter did not provide for assessment of full cash value, the Assessor answered that, 'the charter did not say what year—present, past or future.'"

135. FLA. STAT. § 193.11(3) (1957) as enacted by 1957 Fla. Laws 356, ch. 57-

after several unsuccessful attempts,¹³⁶ the legislature required the assessor to consider a series of factors in determining the just value of property.¹³⁷ The legislation eliminated the assessor's selection of valuation method or procedure by requiring that he now

take into consideration the following factors:

- (1) The present cash value of the property;
- (2) The highest and best use to which the property can be expected to be put in the immediate future; and the present use of the property;
- (3) The location of said property;
- (4) The quantity or size of said property;
- (5) The cost of said property and the present replacement value of any improvements thereon;
- (6) The condition of said property;
- (7) The income from said property.¹³⁸

The Florida Supreme Court, in the landmark case of *Walter v. Schuler*,¹³⁹ held the statutory and constitutional phrase "just valuation" to be "legally synonymous" with "fair market value," which is "the amount a purchaser willing but not obliged to buy, would pay to

195, § 1. This provision was upheld in *Tyson v. Lanier*, 156 So. 2d 833 (Fla. 1963). The constitution currently in effect contains express authority for special classification and valuation of agricultural property in FLA. CONST. art. VII, § 4(a) (1968).

Earlier legislation, 1943 Fla. Laws 875, ch. 22,079, § 22, had authorized the Comptroller to promulgate "standard measures of value" to be followed by the tax assessors in valuing property. Even though this might seem to affect the discretion of the tax assessor, the court has held "that any standard measure of value promulgated by the State Comptroller would not destroy the right of the tax assessor to exercise his discretion or judgment in reaching the ultimate conclusion of just value." *Powell v. Kelly*, 223 So. 2d 305, 309 (Fla. 1969).

136. See Note, *Assessment Standards and Property Tax Equity in Florida*, 17 U. FLA. L. REV. 83, 96-100 (1964).

137. 1963 Fla. Laws § 1, 600 ch. 63-250.

138. FLA. STAT. § 193.021 (1963). An eighth factor was added by 1967 Fla. Laws 336, ch. 67-167, § 1:

- (8) The net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing.

139. 176 So. 2d 81 (Fla. 1965).

one willing but not obliged to sell.’ ”¹⁴⁰ The Court stated that the new statute

was not intended to give assessors an almost unbridled discretion in the performance of their duty to establish just valuation. Rather, we regard the Act as an attempt by the legislature to pin the assessors more firmly to the Constitutional mandate. The result of such a construction is not to deprive these officers completely of their discretion for there is bound to be some tolerance in the execution of their task as they receive, weigh and evaluate varying information on the subject from different sources they consider reliable, but this opinion is designed to put at rest the procedure of setting assessable values at a percentage of “X”. It is apodictic that a percentage of “X” cannot be computed without first establishing “X” and the assessors upon reaching the first figure are enjoined not to proceed to the second.¹⁴¹

This statute’s constraint on the assessor’s discretion in requiring consideration of the statutory factors proved somewhat illusory. Cases held the assessor’s valuation invalid when the assessor *failed to consider* one or more of the factors.¹⁴² Customarily, however, the assessor’s “judgment [was not] disturbed if it [could] be arguably contended that [the assessor had] abided by the criteria” required by law.¹⁴³ In a recent decision, the Court held the assessor need not give each factor equal weight, if “EACH FACTOR IS FIRST CAREFULLY CONSIDERED AND SUCH WEIGHT IS GIVEN TO A FACTOR AS THE FACTS JUSTIFY.”¹⁴⁴

A 1968 constitutional revision granted the legislature authority to reduce the assessor’s discretion in valuing land used for agricultural or non-commercial recreational purposes, and valuing livestock or tangible

140. *Id.* at 85-86 (quoting from *Root v. Wood*, 155 Fla. 613, 21 So. 2d 133 (1945)).

141. *Id.* at 85. *Accord* *Keith Investments, Inc. v. James*, 220 So. 2d 695, 696 (Fla. 4th Dist. Ct. App. 1969).

142. *Palm Corp. v. Homer*, 261 So. 2d 822 (Fla. 1972); *accord* *Exchange Realty Corp. v. Hillsborough County*, 272 So. 2d 534 (Fla. 1973).

143. *Miller v. Tax Assessor*, 31 Fla. Supp. 194, 196 (Cir. Ct. Pinellas County 1968).

144. *Lanier v. Walt Disney World Co.*, 316 So. 2d 59, 62 (Fla. 4th Dist. Ct. App. 1975) (emphasis original).

personalty held as inventory.¹⁴⁵ Provision remained for the election of a county tax assessor,¹⁴⁶ but the revision provided nothing for enhanced state supervision of valuations or constraints on the assessor's discretion. The legislature, however, continued to enact legislation increasing state supervision of tax assessors.

The Governmental Reorganization Act of 1969 created and transferred to the Department of Revenue all of the powers and duties previously held by the comptroller with respect to supervision of assessors and uniformity of valuations.¹⁴⁷ In 1969, the legislature also passed an act representing an important, albeit indirect, step in inducing assessors to increase their valuations up to the standard of full just valuation.¹⁴⁸ This act modified the formula for distributing state funds¹⁴⁹ among the sixty-seven school districts throughout the state.¹⁵⁰ Under the act, each school district's allotment of state funds was determined, in part, by reference to the level of assessment of taxable property made by the tax

145. FLA. CONST. art. VII, § 4 (1968). In 1980, this section was amended to authorize the total exemption of inventory from taxation, S.J. Res.12-E, 1980 Fla. Laws 1779. Each of these provisions has been implemented: FLA. STAT. § 193.461 (Supp. 1982) (agricultural lands); *id.* § 193.501 (1981) (recreational lands); *id.* § 192.001(11)(c) (Supp. 1982) ("[a]ll livestock shall be considered inventory"); and *id.* § 196.185 (1981) (exempts all items of inventory from ad valorem taxation after December 31, 1981; prior to that date, inventory was to be assessed "at 10 percent of just valuation," *id.* § 193.511) (1981). Earlier statutory authorization for valuation of inventory at 25 percent of cost was held violative of the 1885 constitutional provisions requiring uniform and equal rates of taxation and just valuation of all property. *Franks v. Davis*, 145 So. 2d 223 (Fla. 1962).

146. FLA. CONST. art. VIII, § 1(d) (1968). A provision was also added by the 1968 constitutional revision to permit counties to abolish any county office and transfer all of the duties of that office to another office. A provision in the Dade County charter abolished the office of property appraiser and transferred the functions to the county manager. *See State ex rel. Glynn v. McNayr*, 133 So. 2d 312 (Fla. 1961).

147. 1969 Fla. Laws 527-28, ch. 69-106, § 21. *See Department of Revenue v. Bell*, 227 So. 2d 684 (Fla. 1st Dist. Ct. App. 1969).

148. 1969 Fla. Laws § 1, 16, ch. 69-1735. This act was initially passed during the regular session, but was vetoed by the Governor on June 28, 1969. The veto was overridden during a special session of the legislature in early December, 1969.

149. In 1969, \$43.6 million was appropriated for this purpose. 1969 Fla. Laws, 380-81, ch. 69-100, § 1 (item 347).

150. The school districts are separate governmental entities whose geographical boundaries are co-extensive with those of the counties. FLA. CONST. art. IX, § 4(a) (1968).

assessor. As such, the lower the level of assessment within a county, the less that county's school district would receive from the state.¹⁵¹ The annual level of assessments for each of the sixty-seven counties was to be determined by the auditor general.¹⁵² It was believed that this scheme would not only produce a more equitable distribution of state funds,¹⁵³ but would improve the level of valuations of property throughout the state.

However, in *District School Board of Lee County v. Askew*,¹⁵⁴ the Court held this scheme to be unconstitutional. The Court, in finding the auditor general's independent ascertainment of property values to be an impermissible usurpation of the duties and powers of the tax assessor, stated:

[W]e hold that the State has no power to ignore the presumption of correctness attendant to the official assessments. To rely on the findings of the Auditor-General . . . ignoring the official assessments, is to negate the discretion granted to the assessors, the discretion necessary to the job, attendant to all educated estimates, and uniformly recognized in the opinions of this Court. We conclude that a finding by the Auditor-General different from that reached by a county tax assessor is, therefore, insufficient to override the official assessment in the absence of a showing that the official assessment represented a departure from the requirements of law and not merely the differences of opinion to be expected when experts approach the subjective business of assessing property.¹⁵⁵

151. FLA. STAT. § 236.07(9)(a) (1969).

152. The Auditor General is an employee of the Legislature, appointed by the legislative auditing committee. FLA. STAT. § 11.42(1) (1969).

153. Under the previous formula, a county whose level of assessment was relatively low received a relatively larger share of state funds, and thus needed to raise a correspondingly lower amount of revenue locally from its ad valorem tax. Therefore, it was to the advantage of property owners within a county to have a low level of valuation made by the tax assessor. A similar approach was later employed to determine, in part, the allocation of state funds to counties and municipalities under state revenue sharing. FLA. STAT. § 218.245 (1973).

154. 278 So. 2d 272 (Fla. 1973).

155. *Id.* at 277.

G. The Past Ten Years

The legislature quickly responded to *District School Board of Lee County* by enacting the Property Assessment Administration and Finance Law, commonly referred to as the "Truth in Taxation Act."¹⁵⁶ This multi-faceted act increased the state's supervision of valuations by restricting the discretion of the tax assessors. The act required assessors to break down the assessment rolls into thirteen different classifications of real property and six classifications of personal property.¹⁵⁷ The act provided for the exchange of information between the Department of Revenue and the tax assessors. In addition, the assessor's records, including worksheets and property record cards, were to be made available to the Department and the auditor general.¹⁵⁸ The assessors were required to submit office budgets to the Department for determination of whether they adequately provided for the performance of the assessors' duties. The Administration Commission, made up of the Governor and cabinet, was given final authority to resolve disputes and to "amend the budget if it [found] any aspect of the budget . . . unreasonable in light of the work load of the assessor's office in the county. . . ."¹⁵⁹ The Department was authorized to standardize contracts for assessment services and computer systems.¹⁶⁰ The act established procedures for the audit of assessment rolls by the auditor general,¹⁶¹ and increased the Department's authority to approve or disapprove assessment rolls.¹⁶² The act establishes an Assessment Re-

156. 1973 Fla. Laws 331, ch. 172. The opinion in the *School Board of Lee County* case was handed down on April 4, 1973, and rehearing was denied on June 20; 172 was signed by the Governor on June 13.

157. FLA. STAT. § 195.073 (1973), as enacted by 1973 Fla. Laws 335, ch. 172, § 3.

158. FLA. STAT. § 195.084 (1973), as enacted by 1973 Fla. Laws 336, ch. 172, § 5.

159. FLA. STAT. § 195.087(1) (1973), as enacted by 1973 Fla. Laws 336-37, ch. 172, § 6.

160. FLA. STAT. § 195.095 (1973), as enacted by 1973 Fla. Laws 338-39, ch. 172, § 7.

161. FLA. STAT. § 195.096 (1973), as enacted by 1973 Fla. Laws 339-40 ch. 172, § 7.

162. FLA. STAT. § 195.097 (1973), as enacted by 1973 Fla. Laws 340-41, ch. 172, § 7; FLA. STAT. §§ 193.114(6), (7) (1973), as enacted by 1973 Fla. Laws 334-45, ch. 172, § 10.

view Commission to hear complaints regarding the approval or disapproval of rolls, allowing direct appeal to the Florida Supreme Court.¹⁶³ Finally, the act included a millage roll-back provision preventing taxing entities reaping a windfall in increased revenues from the anticipated increase in valuations.¹⁶⁴ The legislature also proposed a constitutional amendment changing the name from "tax assessor" to "property appraiser."¹⁶⁵

The "Truth by Taxation Act," in improving the assessor's valuation methods and procedures, as well as the state's supervision and control of property valuation, was striving for valuation of all taxable property at "just value."¹⁶⁶ In addition to placing the property appraiser's exercise of discretion under closer scrutiny, the act, by including elements such as the millage roll-back provision and the name change, provided property appraisers a less politically sensitive environment within which to operate. The focus of attention for property owners and voters was shifted from the property appraiser's valuation of property, the determination of the *tax base*, towards the local government's setting of the millage, the determination of the *tax rate*.

The legislature's action, while achieving progress towards full valuation, fell short of resolving the problem. A county's assessment rolls were to be reviewed in depth only once every three years,¹⁶⁷ reduced to once every four years in 1975.¹⁶⁸ Further, the streamlined, centralized

163. FLA. STAT. § 195.098 (1973), *as enacted by* 1973 Fla. Laws 341-43, ch. 172, § 7. Members of the Commission were to be appointed by the Governor, with the consent of three members of the cabinet and subject to approval by the senate. The appointees were to be "three persons knowledgeable in any of the following three general areas: property tax law, determination of property values, or statistics." *See infra* note 170 and accompanying discussion.

164. FLA. STAT. § 200.065 (1973), *as enacted by* 1973 Fla. Laws 346-48, ch. 172, § 13.

165. H.R.J. Res. 1907, 1973 Fla. Laws 1305-06, ratified in the general election held November 4, 1974, amending FLA. CONST. art. VIII, § 1(d) (1968).

166. This was later described as a legislative decision "to expand the tools made available to the Department for it to 'ride herd' on county officials. . . ." Spooner v. Askew, 345 So. 2d 1055, 1058 (Fla. 1976).

167. FLA. STAT. § 195.096(2) (1973), *as enacted by* 1973 Fla. Laws 339-40, ch. 172, § 7.

168. FLA. STAT. § 195.096 (1975), *as amended by* 1975 Fla. Laws 488-89, ch. 211, § 2. This effectively reduced the potential for the disapproval of a roll to once every four years; or, viewing the situation from another perspective, in any one year

scheme for reviewing the Department's disapproval of an assessment roll fell apart at the seams with the decision in *Slay v. Department of Revenue*.¹⁶⁹ The Court held that a county's circuit court could hear issues relating to the disapproval of an assessment roll, thereby circumventing the Assessment Administration Review Commission. The Commission had been created in part to expedite and consolidate the review of the disapproval of an assessment roll by the Department. Although the Department had long held that power to disapprove an assessment roll because of undervaluations of property, it was reluctant to exercise the power because of the financial chaos it would bring to the taxing entities within the county whose roll had been disapproved. Without a valid roll, the taxing entities could not levy or collect ad valorem taxes. To ameliorate this problem, the 1973 legislation created a procedure which alerted assessors early in the year that rolls of the current year might be disapproved unless defects in rolls of the prior year were corrected.¹⁷⁰ The disapproval of a roll could be appealed to the Assessment Administration Review Commission, with subsequent judicial review in the Florida Supreme Court.¹⁷¹ But because the court held that the county circuit court also had jurisdiction of a disapproved roll, the hope of rapidly resolving controversies disappeared, and the Department was again placed in the politically untenable position of being able to employ its ultimate sanction—disapproving a roll—only with the finesse of a nuclear warhead.

In 1979, the Governor directed the Department of Revenue to strictly enforce the full valuation requirement.¹⁷² The legislature re-

only one-fourth of the counties' rolls were at risk for disapproval. Pajic, Weber & Francis, *Truth or Consequences: Florida Opts for Truth in Millage in Response to the Proposition 8* Fla. St. L.U. Rev. 593, 603 (1980). [hereinafter cited as *Truth or Consequences*.] In addition, the duty of conducting these reviews was shifted from the Auditor General to the Department of Revenue. FLA. STAT. § 20.21 (1975), as amended by 1975 Fla. Laws 487, ch. 211, § 1.

169. 317 So. 2d 744 (Fla. 1975).

170. FLA. STAT. § 195.097(1) (1973), as enacted by 1973 Fla. Laws 340-41, ch. 172, § 7. See *Spooner v. Askew*, 345 So. 2d 1055, 1059 n.15 (Fla. 1976).

171. FLA. STAT. § 195.098 (1973), as enacted by 1973 Fla. Laws ch. 172, § 7. Only one case was ever filed with the Commission, and it was withdrawn before the hearing commenced. *Slay v. Department of Revenue*, 317 So. 2d 744, 745 n.3 (Fla. 1975). The Commission was abolished in 1980. 1980 Fla. Laws ch. 272, § 7.

172. St. Petersburg Times, July 31, 1979, at B1, col. —, cited in *Truth or Con-*

sponded to the potential problems of disapproved assessment rolls by enacting the "Truth in Millage," or "TRIM" Act¹⁷³ (referring to one of six major elements of the Act). The act aimed to produce a system for levying ad valorem taxes on property valued at full cash value. The portion of the act relating to millage was a continuation of the 1973 legislation shifting taxpayers' attention from the valuation process towards the budget setting and millage levying stage. Under the act, property owners are no longer simply notified by the property appraiser of an anticipated increase in assessed valuation of property. Owners now are furnished with a statement reflecting the valuation of their property, and informing them of their possible tax liability depending on whether the same millage is levied as the preceeding year or whether the tax liability will include any amounts for proposed budget changes.¹⁷⁴ Other portions similarly focus attention on those aspects of ad valorem taxation relating to budget making and tax rate setting.¹⁷⁵

The Act makes property appraisers more accountable by providing improved conditions for a property owner to have the valuation of his or her property subjected to administrative review by a Property Appraisal Adjustment Board established for each county.¹⁷⁶ The act also enhances state-level review of assessment rolls by increasing to once every two years the frequency of in-depth studies by the Department, and by requiring the auditor general to conduct a performance audit of the Department at least once every three years and report his findings to the legislature.¹⁷⁷

The Act increases the likelihood that the Department will act to

sequences, supra note 168, at 593 n.1.

173. 1980 Fla. Laws 1143, ch. 274. For an excellent analysis of the Act, see *Truth or Consequences, supra* note 168.

174. 1980 Fla. Laws 274, § 20, *as amended by* 1980 Fla. Laws 1080, ch. 261, § 6. See *Truth or Consequences, supra* note 168, at 610-14.

175. *E.g.*, the tax collector is now required to send to each property owner a statement which not only advises the taxpayer of the amount of taxes due, but also which taxing authorities have imposed increased taxes, and which have not. FLA. STAT. § 197.072(5)(b) (Supp. 1982) as enacted by 1980 Fla. Laws 1181-82, ch. 274, § 38.

176. FLA. STAT. §§ 194.011 (Supp. 1982), 194.015 (1981), 194.032 (Supp. 1982), *as amended by* 1980 Fla. Laws 1174-81, ch. 274, §§ 36, 37. See *Truth or Consequences, supra* note 168, at 618-21.

177. FLA. STAT. § 195.096 (Supp. 1982) *as amended by* 1980 Fla. Laws ch. 274, § 18. See *Truth or Consequences, supra* note 168, at 621-23.

disapprove an assessment roll because of undervaluation of property. Procedures were revised for reviewing a roll's disapproval by eliminating the Assessment Administration Review Commission, providing the circuit court of Leon County with initial jurisdiction, and providing appellate jurisdiction in the First District Court of Appeal.¹⁷⁸ To alleviate the likely financial problems to local entities which a roll disapproval would bring, the act provided for imposition and collection of taxes on an "interim roll" contemporaneous with judicial proceedings regarding the disapproved roll.¹⁷⁹

The Act affects property appraisers' discretion also by reintroducing the level of assessed valuations into the formula for distributing state funds to the sixty-seven school districts.¹⁸⁰ This was basically the same scheme held unconstitutional in *District School Board of Lee County v. Askew*,¹⁸¹ because it allowed the determination of property values by the tax assessor to be overridden by a state official. The constitutional infirmity was remedied, however, by an amendment to the Constitution:

State funds may be appropriated to the several counties, school districts, municipalities or special districts upon such conditions as may be provided by general law. *These conditions may include the use of relative ad valorem assessment levels determined by a state agency designated by general law.*¹⁸²

During the preceding ten years, the legislature has responded to the inequities of undervaluation by increasing state supervision and control of property appraisers. The smallest details of the daily func-

178. FLA. STAT. § 195.092(2) (1981), *as amended by* 1980 Fla. Laws 1154, ch. 274, § 6. *See Truth or Consequences*, *supra* note 168, at 625.

179. FLA. STAT. § 193.1145 (Supp. 1982), *as amended by* 1980 Fla. Laws 1150-53, ch. 274, § 5. *See Truth or Consequences*, *supra* note 168, at 623-25; and *infra* note 232 and accompanying text.

180. FLA. STAT. § 236.081(4) (1981), *as amended by* 1980 Fla. Laws 1161-63, ch. 274, § 21, effective for fiscal year 1983-84 and thereafter, 1980 Fla. Laws, ch. 274, 9, § § 64(2). *See Truth or Consequences*, *supra* note 168, at 625-26.

181. 278 So. 2d 272 (Fla. 1973). *See supra* note 152 and accompanying text.

182. FLA. CONST. art. VII, § 8 (1968), *as amended in* the general election of 1980, S.J. Res. 4-B, 1980 Fla. Laws 177. The italicized language was added by the 1980 amendment.

tions of the office are prescribed by statute or administrative rule; but most importantly, the property appraiser's discretion in valuation has been brought under close scrutiny. The Department of Revenue has been provided not only with a well stocked arsenal of carrots and sticks to use in their supervision of the property appraisers, but also with a non-cataclysmic procedure for disapproving all or portions of a roll because of undervaluations. Whether these measures will prove up to the task of "secur[ing] a just valuation of all property for ad valorem taxation,"¹⁸³ only time will tell.

III. Duties of the Property Appraiser

The property appraiser's¹⁸⁴ primary duty is to prepare annual assessment rolls for the county's real property and tangible personal property,¹⁸⁵ and forward them to the Department of Revenue for approval by the first Monday in July.¹⁸⁶ The rolls show the taxable value¹⁸⁷ of all property within the county, and are utilized by local governmental entities for levying ad valorem taxes.¹⁸⁸ There are four major tasks involved in preparing the assessment rolls: the listing, classification and valuation of all taxable property, and the determination of whether property is exempt or immune from taxation.

The property appraiser is required to "assess all property located within his county, except inventory, whether such property is taxable, wholly or partially exempt, or subject to classification reflecting a value less than its just value at its present highest and best use."¹⁸⁹ In complying with this requirement, the property appraiser must *list* on the assessment roll all real property within the county,¹⁹⁰ and all tangible

183. FLA. CONST. art. VII, § 4 (1968).

184. Property appraisers are authorized to appoint deputies to act in their behalf in carrying out the duties of the office. FLA. STAT. § 193.024 (1981).

185. FLA. STAT. § 193.114(1) (Supp. 1982).

186. FLA. STAT. § 193.1142(1) (Supp. 1982).

187. "Taxable value" is defined as "the assessed value of property minus the amount of any applicable exemption provided under ss. 3 and 6, Art. VII of the State Constitution and chapter 196." FLA. STAT. § 192.001(16) (Supp. 1982).

188. FLA. STAT. § 200.065 (Supp. 1982).

189. FLA. STAT. § 192.011 (1981).

190. Governmentally owned streets, roads and highways need not be listed. FLA. STAT. § 193.085(1) (1981).

personal property with a situs¹⁹¹ within the county which has been included on a return,¹⁹² or, if omitted from a return, which has been discovered by the property appraiser.¹⁹³ Unless expressly exempted, all real and personal property located in Florida, and all personal property belonging to Florida residents, is subject to ad valorem taxation.¹⁹⁴ Property generally becomes taxable in the jurisdiction in which it is physically present on January 1 of each year,¹⁹⁵ and its "just value" is to be determined as of that date also.¹⁹⁶

The owner of tangible personal property is required to file a return with the property appraiser of the county in which the property is taxable, listing the items of personalty and the owner's estimate of their value.¹⁹⁷ Such returns must be filed by April 1 each year,¹⁹⁸ and penalties are provided for the failure to file, or late filing of a return, or omission of property from a return.¹⁹⁹ Railroad and railroad terminal companies which maintain tracks or other fixed assets within Florida are required to submit a return to the Department of Revenue by April 1; the Department is charged with the duty of valuing such property and, by June 1, notifying each county of the assessed value of such property within each county.²⁰⁰ No return is required for real property, if the ownership is reflected in the public records of the county in which it is located.²⁰¹

191. Tangible personal property has a situs in the county in which it is permanently located on January 1. FLA. STAT. § 192.032(2) (Supp. 1982).

192. FLA. STAT. § 193.114(3) (Supp. 1982).

193. FLA. STAT. § 193.073 (1981).

194. FLA. STAT. § 196.001 (1981). Leasehold interests in property owned by a governmental entity are also taxable, unless used for an exempt purpose. *Id.*

195. FLA. STAT. § 192.032 (Supp. 1982).

196. FLA. STAT. § 192.042 (1981). In addition, if property was omitted from an assessment roll, it may be assessed for the three years preceding the year in which the omission is discovered at its just value on each of the three preceding first days of January. FLA. STAT. § 193.092 (1981).

197. FLA. STAT. §§ 193.052(1), (3), (4) (Supp. 1982); 195.027(4) (1981).

198. FLA. STAT. § 193.062(1) (1981).

199. FLA. STAT. § 193.072(1) (1981) (penalty of 25% of tax liability for failure to file a return), (2) (penalty of 5% of tax liability for each month a return is late, up to a maximum of 25% penalty), (3) (penalty of 15% of tax attributable to property omitted from a return).

200. FLA. STAT. §§ 193.062(3), 193.085(4) (1981).

201. FLA. STAT. § 193.052(2) (Supp. 1982). There are a few exceptions, requir-

All property required to be listed on the assessment rolls must also be *classified* according to its use.²⁰² Real property is divided into nine classes;²⁰³ personal property, into five.²⁰⁴ These separate classifications allow component parts of the assessment rolls to be scrutinized more carefully, thereby aiding the Department of Revenue in its supervision of the property appraisers and its review of the rolls.²⁰⁵ In addition, certain special classes of property are to be treated differently in the preparation of the assessment rolls. Agricultural property is to be valued with reference to its agricultural use, even though such value might be less than its full just value.²⁰⁶ Land which is environmentally endangered or utilized for outdoor recreational or park purposes may similarly qualify for valuation at less than full just value.²⁰⁷ Improvements

ing a return in order to qualify for special treatment. *E.g.*, FLA. STAT. § 193.621(5) (Supp. 1982), (return required if taxpayer claims the right to have certain pollution control facilities valued at salvage value). *See infra* note 204. Such returns are due by April 1. FLA. STAT. § 193.062(4) (1981). If the owner of real property who also owns the mineral, oil, gas or other subsurface rights so requests, the property appraiser must separately assess such subsurface rights; separate assessment is also required if the subsurface rights are owned by a party other than the party with ownership of the remainder of the fee. FLA. STAT. § 193.481 (1981).

202. FLA. STAT. § 195.073 (Supp. 1982).

203. The nine classes of real property are: residential, commercial and industrial, agricultural, nonagricultural acreage, exempt wholly or partially, centrally assessed, leasehold interests, time-share property, and other. The residential class is further divided into six subclasses: single family, mobile homes, multifamily, condominiums, co-operatives, and retirement homes. FLA. STAT. § 195.073(1) (Supp. 1982).

204. The five classes of personalty are: residential floating structures, nonresidential floating structures, mobile homes and attachments, household goods, and other tangible personal property. FLA. STAT. § 195.073(2) (Supp. 1982). Mobile homes are not subject to ad valorem taxation if they are registered and licensed as motor vehicles pursuant to FLA. STAT. ch. 320 (Supp. 1982). FLA. CONST. art. VII, § 1(b) (1968). Any mobile home without a current motor vehicle license plate properly affixed is presumed to be either real property or tangible personal property; however, if it is permanently affixed to land owned by the person who also owns the mobile home, it is presumed to be real property. FLA. STAT. § 193.075 (1981).

205. *See* FLA. STAT. § 195.096(3) (Supp. 1982), 195.097(1) (Supp. 1982).

206. FLA. STAT. § 193.461 (Supp. 1982). In order to be entitled to such treatment, a return requesting agricultural classification must be filed by March 1 each year.

207. FLA. STAT. § 193.501 (1981). A related provision, *id.* § 193.507, (1981) directs the property appraiser, upon petition by a property owner, to reclassify and

to certain real property, either in the nature of qualified pollution control facilities,²⁰⁸ or to permit access by physically handicapped persons,²⁰⁹ are deemed to not increase the value of the property so improved by more than the salvage value of the materials utilized. Finally, within the proper classifications, there is to be separate identification of property which qualifies for various corporate income tax credits,²¹⁰ or for an economic development ad valorem tax exemption.²¹¹

The *valuation* of property on the assessment rolls has been the most troublesome aspect of the duties of the property appraiser. The Constitution provides that "[b]y general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation. . . ."²¹² "Just valuation" has been held to be synonymous with "fair market value," which is "the amount a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell."²¹³ Provisions of general law must be complied with by the property appraiser in valuing property, their overall objective being to direct the property appraiser in satisfying the constitutional mandate to "secure a just valuation of all property." Eight factors are enumerated which the property appraiser is required to consider in arriving at the just value of property.²¹⁴ In addition, to ensure that the actual physical condition of real property is being monitored, the property appraiser is

reassess real property which is located in an area designated as an area of critical state concern, if that designation affects the highest and best use to which the property might be expected to be put. The property appraiser is required to separately identify property assessed as environmentally endangered, and property assessed as outdoor recreational or park land. *Id.* § 193.301(7) (1981).

208. FLA. STAT. § 193.621 (1981).

209. FLA. STAT. § 193.623 (1981).

210. FLA. STAT. § 195.073(4) (Supp. 1982) (cross-reference to FLA. STAT. § 220.18 (1981) gasohol development tax incentive credit), (5) (cross-reference to FLA. STAT. § 220.182 (Supp. 1982) economic revitalization tax incentive credit).

211. FLA. STAT. § 195.073(6) (Supp. 1982). The economic development ad valorem tax exemption is authorized by FLA. CONST. art. VII, § 3(c) (1968) and may be implemented pursuant to FLA. STAT. § 196.199 (Supp. 1982).

212. FLA. CONST. art. VII, § 4 (1968).

213. *Walter v. Schuler*, 176 So. 2d 81 (Fla. 1965); *see supra* note 139 and accompanying text.

214. FLA. STAT. § 193.011 (1981); *see supra* note 138 and accompanying text.

required to inspect each parcel at least once every three years.²¹⁵ However, the most significant provisions of general law which have been enacted to achieve the constitutional objective of just valuation are contained in Florida Statutes Chapter 195, "Property Assessment Administration and Finance." The general scheme is to provide the Department of Revenue with a great deal of oversight and control over the methods and procedures used by property appraisers in valuing property, culminating with the ultimate authority to disapprove an assessment roll if it does not comply with the just valuation requirement.²¹⁶

In order to assist specifically with the valuation process, the Department is authorized to establish "standard measures of value," which are "guidelines for the valuation of property and methods for property appraisers to employ in arriving at the just valuation of particular types of property."²¹⁷ The standard measures of value are to be included in a manual of instructions prepared by the Department, along with other rules and regulations, forms and regulations relating to the use of forms and maps which have been prepared by the Department, and other information considered by the Department to be useful in the administration of taxes.²¹⁸

As matters of more general supervision, the Department is authorized to have full access to the records of property appraisers;²¹⁹ it is directed to review the annual budget for the operation of each property appraiser's office;²²⁰ it is to establish a list of approved bidders who may provide property appraisers with assessment services or systems or electronic data-processing programs or equipment;²²¹ and the Depart-

215. FLA. STAT. § 193.023(2) (1981).

216. FLA. STAT. §§ 195.0012 (1981), 195.002 (1981); *see supra* notes 156-63, 177-79 and accompanying text.

217. FLA. STAT. § 195.032 (Supp. 1982). The standard measure of value are deemed to be *prima facie* correct. *See St. Joe Paper Co. v. Conrad*, 333 So. 2d 527, 529 (Fla. 1st Dist. Ct. App. 1976), *cert. denied*, 344 So. 2d 324 (Fla. 1977).

218. FLA. STAT. § 195.062 (1981). The Department is required to make available maps and mapping materials sufficient to ensure that all real property within the state is listed and valued. FLA. STAT. § 193.085(2) (1981).

219. FLA. STAT. § 195.084(2) (1981).

220. FLA. STAT. § 195.087 (Supp. 1982).

221. The Department is also authorized to promulgate standard contracts for the property appraisers to use in obtaining such services or equipment. FLA. STAT. § 195.095 (1981).

ment is required to promulgate rules prescribing uniform standards and procedures for computer programs and operations utilized by property appraisers so that data will be comparable among counties and so that a single audit procedure will be practical for all property appraisers' offices.²²² In order to enforce the performance of any of the duties of the property appraiser, the Department is authorized to bring suit in the circuit court of the errant property appraiser's county, and such court is authorized to order, *inter alia*, "the implementation of a plan of reappraisal to be completed within a prescribed period of time."²²³

Property appraisers are required to submit their assessment rolls to the Department of Revenue by the first Monday in July of each year,²²⁴ and the executive director of the Department is to disapprove all or any part of an assessment roll which is not "in substantial compliance with law."²²⁵ The determination of a property appraiser's non-compliance may be based on information discovered by the Department, including audits prepared by the Department or the auditor general.²²⁶ While a decision to disapprove a roll may be based upon data confined solely to the roll being reviewed in that year, a more solid foundation for disapproval rests upon the authority of the Department to utilize data from the rolls of the preceding year. Under this procedure, the Department may evaluate a roll *after* it has been approved, and then notify the property appraiser of any defects in that roll, and what he or she must do in order to eliminate those defects from the roll for the following year.²²⁷ During a period of approximately six weeks beginning when the Department sends such a notice, the property appraiser must either agree to comply with the suggested corrective action, or meet with the executive director of the Department in an attempt to resolve their differences.²²⁸ In any event, the Department is to issue an administrative order to the property appraiser, either incorporating his or her agreement to comply with the Department's earlier

222. FLA. STAT. § 195.027(2) (1981).

223. FLA. STAT. § 195.092(4) (1981).

224. FLA. STAT. § 193.1142(1) (Supp. 1982).

225. *See* FLA. STAT. § 193.1142 (Supp. 1982).

226. *Id.*

227. FLA. STAT. § 195.097(1) (Supp. 1982). The notice of defects is to be provided to the property appraiser by November 15.

228. FLA. STAT. § 195.097(2) (Supp. 1982).

notice, or directing that specified remedial action be taken.²²⁹

The property appraiser is required to notify the Department of his or her intention to comply with the administrative order, or the basis for intended noncompliance.²³⁰ If noncompliance is indicated, the Department may seek judicial review at that point.²³¹ If compliance is indicated, the Department is to closely supervise the preparation of the assessment rolls to ensure that the order is complied with and that property is valued at its just value.²³² If it appears by May 1 that the property appraiser is not in substantial compliance with the administrative order, the Department is to notify the property appraiser and the governing body of each tax-levying agency in that county of its intention to disapprove all or a portion of that assessment roll.²³³ Then, if the roll which is submitted to the Department is not in compliance with the administrative order, the Department will disapprove the roll, or the defective portions thereof.²³⁴ When a roll is disapproved, in whole or in part, local governmental agencies may levy their ad valorem taxes on the basis of an "interim assessment roll," which, in these circumstances, is the roll which was submitted, even though disapproved.²³⁵ After the deficiencies in the disapproved roll have been corrected, or the judicial review of the disapproval has been concluded, the property appraiser is required to reconcile the differences between the interim roll and the final roll, and any supplemental bills or refunds, as appropriate, are to be sent to taxpayers.²³⁶

The statutes speak broadly of all real and personal property with a situs in Florida, and all personal property belonging to Florida residents, being subject to ad valorem taxation "[u]nless expressly ex-

229. *Id.* The administrative order must be issued no later than January 1.

230. FLA. STAT. § 195.097(3) (Supp. 1982). The notification to the Department must be made no later than January 15.

231. *Id.* See FLA. STAT. § 195.092(4) (1981).

232. FLA. STAT. § 195.097(4) (Supp. 1982).

233. *Id.*

234. FLA. STAT. § 193.1142(2) (Supp. 1982).

235. An interim roll may also be authorized if the current year's roll has not been timely prepared or approved; the interim roll in this circumstance is the last approved roll, adjusted to the extent practicable to reflect additions, deletions and changes in ownership. FLA. STAT. § 193.1145 (Supp. 1982).

236. *Id.*

empted from taxation."²³⁷ However, property which is immune from taxation is also nontaxable, even though no specific statutory mention is made of the concept. Property belonging to the federal government or one of its instrumentalities is immune from taxation under the United States Constitution,²³⁸ as are imports.²³⁹ Similarly, property belonging to the State of Florida, one of its instrumentalities or political subdivisions is immune from taxation.²⁴⁰ By contrast, municipalities²⁴¹ and other public corporate bodies²⁴² are not political subdivisions of the state and thus their property does not enjoy immunity from taxation—property owned by such entities may, however, be exempt from taxation.²⁴³

In preparing the assessment rolls, the property appraiser must determine whether property which is not immune is nonetheless exempt²⁴⁴ from taxation, so that taxes will not be levied on such property.²⁴⁵ Exemptions may be classified into two broad groups: those which are authorized according to clearly stated objective criteria, and those which fall under the broader, less well defined areas of uses for educational,

237. FLA. STAT. § 196.001 (1981).

238. *First National Bank of Homestead v. Dickinson*, 291 F. Supp. 855 (D.C. Fla. 1968), *aff'd*, 393 U.S. 409 (1969). FLA. STAT. § 196.199(1)(a) (Supp. 1982) speaks, confusingly, of such property being "exempt" from taxation.

239. U.S. CONST. art. I, § 10; *see also* *Michelin Tire Co. v. Wages*, 423 U.S. 276 (1976).

240. *Park-N-Shop, Inc. v. Sparkman*, 99 So. 2d 571 (Fla. 1957); *Dickinson v. Tallahassee*, 325 So. 2d 1 (Fla. 1975). *See generally* 31 FLA. JUR., *Taxation* § 135 (1974).

241. FLA. CONST. art. VII, § 3(a) (1968); *State ex rel. Burbridge v. St. John*, 143 Fla. 544, 197 So. 131 (1940).

242. *Hillsborough County Aviation Authority v. Walden*, 210 So. 2d 193 (Fla. 1968).

243. FLA. STAT. § 196.199(1)(c) (Supp. 1982).

244. The exemptions from ad valorem taxation are authorized by FLA. CONST. art. VII, §§ 3, 4, 6 (1968), and implemented by various sections of FLA. STAT. ch. 196 (1981 and Supp. 1982).

245. FLA. STAT. § 196.193, § 196.141 (1981). In addition, for the purposes of assessment roll recordkeeping and reporting, exemptions authorized by each provision of the statutes must be reported separately for each category of exemption, both as to total value exempted and as to the number of exemptions granted. FLA. STAT. § 196.002(2) (1981).

literary, scientific, religious, charitable or governmental purposes.²⁴⁶ The first category includes: exemptions for property owned and used as a homestead;²⁴⁷ the further exemption for property owned and used as a homestead by qualified veterans who are permanently and totally disabled,²⁴⁸ or by veterans who are confined to wheelchairs,²⁴⁹ or by qualified non-veterans who are afflicted with specified physical conditions or who are totally and permanently disabled;²⁵⁰ the exemption of property to the value of \$500 of every Florida resident who is a widow, blind or totally and permanently disabled;²⁵¹ the exemption for real property upon which a renewable energy source device is installed and operated;²⁵² the total exemptions for household goods and personal effects of Florida residents²⁵³ and items of inventory;²⁵⁴ and economic development exemptions for qualifying new businesses and expansions of existing businesses.²⁵⁵ Some of the objective criteria for the exemptions in

246. FLA. CONST. art. VII, § 3(a) (1968) provides that "[s]uch portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation." This is implemented by FLA. STAT. § 196.192 (Supp. 1982):

(1) all property used exclusively for exempt purposes shall be totally exempt from ad valorem taxation.

(2) All property used predominantly for exempt purposes shall be exempted from ad valorem taxation to the extent of the ratio that such predominant use bears to the nonexempt use.

"Exempt use of property" is defined, in turn, by FLA. STAT. § 196.012(1) (Supp. 1982) as "predominant or exclusive use of property for educational, literary, scientific, religious, charitable, or governmental use, as defined in [chapter 196]."

247. The homestead exemption is provided by FLA. CONST. art VII, § 6 (1968) and is implemented by FLA. STAT. § 196.031 (Supp. 1982).

248. FLA. STAT. § 196.081 (1981).

249. FLA. STAT. § 196.091 (1981).

250. FLA. STAT. § 196.101 (1981). The exemption is for real property owned and used as the homestead by a person who is a quadriplegic, paraplegic, hemiplegic, legally blind, or otherwise totally and permanently disabled if he or she must use a wheelchair for mobility.

251. FLA. STAT. § 196.202 (1981).

252. FLA. STAT. § 196.175 (1981). Renewable energy source devices are defined in FLA. STAT. § 196.012(13) (Supp. 1982).

253. FLA. STAT. § 196.181 (1981). Household goods and personal effects are defined in F.A.C. § 12D-7.02.

254. FLA. STAT. § 196.185 (1981).

255. FLA. STAT. § 196.195 (1981). Definitions of a qualifying "new business"

the first category are to be ascertained by the property appraiser,²⁵⁶ but, where appropriate, he may rely on the opinion of others as to the physical condition of an applicant.²⁵⁷

Exemptions in the second category are less well defined and thus are more difficult to apply, although the property appraiser is given some legislative guidance in certain areas. For example, property used by public fairs and expositions chartered by Fla. Stat. ch. 616 is presumed to be used for educational purposes and is thus entitled to exemption.²⁵⁸ Similarly, additional criteria are provided for the determination of whether a charitable purpose is being served by hospitals, nursing homes, and homes for special services.²⁵⁹ If property is devoted to an exempt use on less than an exclusive basis, and if the exempt use is nonetheless the predominant use of the property, exemption is authorized to the extent of the predominant use;²⁶⁰ there is statutory guidance for determining the extent of exempt use of property.²⁶¹ Ex-

and "expansion of an existing business" are provided in FLA. STAT. §§ 196.012(14), (15) (Supp. 1982), respectively.

256. *E.g.*, FLA. STAT. § 196.181 (1981) provides exemption for household goods and personal effects belonging "to every person residing and making his or her permanent home in this state." The property appraiser is provided with nine factors to consider in determining whether an individual has established a permanent residence in Florida. FLA. STAT. § 196.015 (1981).

257. Exemptions for certain veterans with physical disabilities provided by FLA. STAT. §§ 196.081 (1981) and 196.091 (1981) may be based upon a letter from the United States Government or United States Veterans' Administration relating to the appropriate physical condition. FLA. STAT. § 196.24 (1981). Exemptions provided by FLA. STAT. § 196.101 (1981) may be based upon a certificate from the Veterans' Administration or from two doctors licensed to practice in Florida. *See also* FLA. STAT. § 196.012(10) (Supp. 1982). The exemption for blind persons provided by FLA. STAT. § 196.202 (1981) may be based on certification from the Florida Bureau of Blind Services. F.A.C. § 12D-7.03(1)(c). In addition, applications for the economic development ad valorem tax exemption authorized by FLA. STAT. § 196.1995 (1981) are to be *granted* by the governing body of the county or municipality in which the property is located.

258. FLA. STAT. § 196.198 (1981). *See also* FLA. STAT. §§ 196.1985, 196.1986 (1981).

259. FLA. STAT. §§ 196.197 (1981), 196.1975 (Supp. 1982).

260. FLA. STAT. § 196.192(2) (1981). Predominant use of property is defined as "property used for exempt purposes in excess of 50 percent but less than exclusive." FLA. STAT. § 196.012(3) (Supp. 1982).

261. FLA. STAT. § 196.196 (1981).

emptions for the religious, literary, scientific or charitable use of property are available only if the owner of such property is a nonprofit organization, and statutory criteria are supplied for the property appraiser to follow in making that determination as well.²⁶²

The property appraiser is assisted in the task of deciding whether property is entitled to exemption by the requirement that an application for exemption must be filed with the property appraiser by March 1 of each year—the failure to file an application constitutes a waiver of any exemption privilege for that year.²⁶³ The same rule applies to the homestead exemption,²⁶⁴ but because of the political visibility and widespread use of this exemption, the property appraiser is required to remind each person who was entitled to the exemption in the previous year of the need to apply for the exemption in the current year, and to furnish an application form for that purpose.²⁶⁵

IV. Conclusion

The property appraiser today plays a central role in the imposition of ad valorem taxes by Florida's local governmental units. This is a role inherent to the fundamental nature of ad valorem taxation, because such a tax is imposed on property subject to the levy, and it is measured by the value of such property. Therefore, *someone* must determine what property is taxable and ascertain its value. In Florida, the locally elected property appraiser for each county has traditionally been the person charged for those tasks. However, the state no longer imposes a general property tax, and the systems of communication and transportation have been vastly improved since the mid-1800s.

Over the past several years, the courts have prodded the legisla-

262. FLA. STAT. § 196.195 (1981).

263. FLA. STAT. § 196.011(1) (Supp. 1982). There are exceptions to the annual application requirement for the exemption of certain property owned by houses of public worship, household goods and personal effects of Florida residents, public road rights-of-way and borrow pits, and property of the state, any county, any municipality, any school district, or any community college district. FLA. STAT. § 196.011(2), (3) (Supp. 1982). Applications for exemption are to be filed on forms prepared and distributed by the Department of Revenue. FLA. STAT. § 196.193(2) (1981).

264. FLA. STAT. § 196.131 (1981).

265. FLA. STAT. 196.111 (1981). The forms are to be provided to the property appraisers by the Department of Revenue. FLA. STAT. § 196.121 (1981).

ture to take strong action to ensure full valuation, and the Department of Revenue has been provided with a plethora of devices to oversee the property appraisers in the performance of their duties. The ultimate objective is to achieve full valuation so that ad valorem taxes may be imposed equally and uniformly throughout the state. The need for state-wide full valuation has also been accentuated by the homestead exemption, by multi-county special district levies, and the use of the assessment rolls as an appropriate measure, in part, for the distribution of state funds to local governmental entities, including school districts.

The existing scheme of locally elected property appraisers and Department of Revenue supervision is cumbersome and inefficient. Full valuation would be a more reasonably obtainable objective, and the integrity of the tax rolls would be improved if the property appraisers were employees of the Department of Revenue, directly accountable to the Executive Director. Perhaps, for the purpose of assigning valuation responsibilities, the state could be divided into geographical divisions which do not adhere to county lines. However, property owners should continue to be provided with the opportunity for local relief by authorizing the board of county commissioners to hear complaints as to the denial of exemptions and as to valuation, as they do today. The local circuit court should retain jurisdiction as well, but appellate jurisdiction should be consolidated, either in the First District Court of Appeals, or in a separate Appellate Tax Court, with ultimate judicial review in the Supreme Court. The Department of Revenue would be the sole necessary defendant in such proceedings. There would be no need for the Department to disapprove a tax roll, thereby disrupting local finances. Instead, the professional appraiser whose responsibility it was for the preparation of the defective portion of the roll would be subject to dismissal by the Department, rather than being rewarded by re-election as often is the case today.

The ad valorem tax is a practical, useful source of revenue for local governmental entities. However, there is no need for the tax base to be determined by a locally elected official. The ad valorem tax is a good tax only if it is fairly imposed. The best way to ensure that is to have the exemption and valuation duties performed by persons who are subject to uniform, state-wide standards and who are subject to meaningful, immediate review of the performance of their duties. The appropriate place for professional property appraisers in the scheme of ad

valorem taxation is *within* the Department of Revenue, rather than merely being subject to the Department's oversight.

Water Transfer: Shall We Sink or Swim Together?

For all life water is necessary. For many uses it is convenient. In much of its functioning it is commonplace.

But commonplace things often are the least appreciated and the hardest to understand In considering its uses and abundance and properties, however, we must keep in mind this main fact: Water is needed for life.¹

These words are especially meaningful today in light of recurrent water shortages across the United States. There is an honest realization that to sustain an ample supply of water, sensible planning, control, and fairness is required. Recurrent shortages are triggered by various conditions: supply and demand imbalance; population shifts to the sun-belt states resulting in locally and regionally concentrated consumptive increases in areas with scant water resources; pollution of lakes, streams, and ground water; acid rain pollution; and industrial or agricultural demand.² It has been said that "[t]he water crisis of the 1980s and 1990s will rival the oil crisis of the 1970s."³ The demands for human survival, for economic stability and growth, and for achieving the goal of energy self-sufficiency — which overtax the water supply — have naturally given rise to friction between those who have and those who do not have.

The United States Supreme Court, in the landmark case of *Sporhase v. Nebraska*,⁴ furnishes present-day guidelines whereby confrontations may be avoided between those who need water and those who control its distribution. The opinion specifically addresses the sensitive issue of interstate transfer of ground water.⁵ The Court declared

1. R. CLARK, WATERS AND WATER RIGHTS § 2.1 (1967 & Supp. 1978).

2. GENERAL ACCOUNTING OFFICE, WATER ISSUES FACING THE NATION: AN OVERVIEW (May 6, 1982). See also Canby, *Our Most Precious Resource: Water*, 158-2 NATIONAL GEOGRAPHIC 144 (August, 1980).

3. Quade, *Water Wars Predicted in a Thirsty Nation*, 68 A.B.A. J. 1066 (1982).

4. 102 S. Ct. 3456 (1982).

5. Water is generally categorized as follows: 1) "Lakes and streams on the sur-

face": bodies of water on beds within well defined boundaries; 2) "Surface water": water "from rains, springs and melting snow and ice, and which follows the contours of the land and has not yet reached a well defined water course or basin Surface waters have not yet reached a stream or lake."; 3) "Underground or percolating water": "below surface [water which] seeps, oozes or filters into the earth from the surface and moves, drips or flows among the interstices of the earth." R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 276-77 (3d ed. 1981). This note will refer to underground or percolating water as ground water.

The legal aspects of *interstate ground* water transfer are to be distinguished from the devices governing *interstate surface* water transfer and diversion (surface water used to encompass those waters within or without well defined boundaries). The two major devices employed in the area of *interstate surface* water transfer and diversion are as follows:

1) *Equitable Apportionment Doctrine*: "Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 102 S. Ct. 539, 545 (1982) (Colorado sought equitable apportionment of the Vermejo River in order to divert river's waters for future uses; case remanded to Special Master for additional fact finding to enable Supreme Court to apply equitable apportionment doctrine). The doctrine attempts to assure an equitable allocation of water among the states appurtenant to the interstate body of surface water.

2) *Interstate Compacts*: U.S. CONST. art. I, § 10, cl. 3 is the constitutional basis authorizing states to negotiate compacts: "No State shall, without the consent of Congress . . . enter into any agreement or compact with another State, or with a foreign Power" The interstate compact is preceded by negotiations between the states involved. Frequently, there is a federal representative present to assist in the negotiations. Finally, the negotiation process will generally be followed by Congress' imprimatur, known as Congressional consenting legislation, with or without modification. *See generally* 2 R. CLARK, *WATERS AND WATER RIGHTS* §§ 133.1-133.4 (1967 & Supp. 1978).

Congressional consent, when required, may be inferred from a statute or pattern of enactments, may take the form of prior authorization as well as that of subsequent approval, and may be conditioned on state acceptance of congressionally mandated modifications. Whether or not the United States chooses to become one of the compacting parties, a valid compact is binding on the citizens of the signatory states, may be enforced by federal statute, and itself operates as federal law in the sense that construction of its terms is a federal question for purposes of Supreme Court review of a state court decision and in the further sense that signatory states cannot plead state law, even state constitutional law, as a defense to compliance with the compact's terms as construed by the Supreme Court.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-31, at 402 (1978 & Supp. 1979) (footnotes omitted).

For examples of an interstate compact, see *Susquehanna River Basin Compact*,

water an article of commerce,⁶ thereby bringing water within the purview of the Constitution's Commerce Clause,⁷ and furthermore, proscribed as unconstitutional a provision in a Nebraska "embargo" statute regulating the interstate transfer of ground water.⁸ The *Sporhase* decision promulgates new water law and policy, and represents a step toward moderating the controversy regarding the interstate transfer of ground water.

This note will examine the history of attempted interstate transfer of natural resources, culminating in an analysis of the *Sporhase* decision and its implications, both present and future. It will also review selected cases of current litigation and policy in the area of water transfer, primarily focusing on the interstate transfer of ground water, considering the state interest weighed against both private need and the national interest. In order to effectively implement the *Sporhase* decision, this note proposes the elimination of all absolute and reciprocal water embargo statutes as facially discriminatory legislation, and consequently unconstitutional. Moreover, this note supports the employment of the *Pike v. Bruce Church*⁹ Commerce Clause balancing test by

Pub. L. No. 91-575, 84 Stat. 1509 (1970) and the Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968).

6. *Sporhase*, 102 S. Ct. 3456.

7. U.S. CONST. art. I, § 8, provides in part: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

8. *Sporhase*, 102 S. Ct. at 3465, 3467 (invalidating reciprocity provision of NEB. REV. STAT. § 46-613.01 (1978)). The water "embargo" statutes are classified as absolute, reciprocal, or discretionary and seek to prohibit or control the flow of water out-of-state. The *Sporhase* Nebraska statute was a discretionary-reciprocal-absolute statute. It was discretionary in that authorization by the Nebraska Director of Water Resources was required prior to withdrawal of *intrastate* ground water for transport and ultimate use *interstate*. The statute was reciprocal because unless the state to which water was to be transferred from Nebraska provided for reciprocal transfer rights, no water was to be removed from Nebraska. The statute was absolute because Colorado, the state to which appellants *Sporhase* and *Moss* needed to transfer water from their Nebraska property, did not provide for reciprocal transfer rights. Consequently, *Sporhase* and *Moss* were absolutely prohibited from transferring water to Colorado, regardless of their application to the Nebraska Director of Water Resources. It was the reciprocity provision, discussed *supra* text accompanying notes 112-116, of the Nebraska statute which was declared unconstitutional.

9. 397 U.S. 137, 142 (1970).

which to scrutinize state regulation of the interstate transfer of ground water by a state's use of discretionary water embargo statutes. Lastly, this note recommends the use of interstate compacts¹⁰ to terminate the interstate rivalries concomitant with interstate ground water transfer. The application of the interstate compact device and the Commerce Clause doctrine are necessary tools to govern in an area which requires and will continue to require the equitable distribution of a precious and rapidly vanishing natural resource, and as of recent, article of commerce.

Natural Resources and the Commerce Clause

The Commerce Clause has been the primary vehicle by which complainants have challenged a state's attempted sheltering of its natural resources. The cases employing this approach demonstrate a gradual erosion of the concept of state ownership in natural resources. Although considered natural treasures, these resources were also recognized as objects of commerce and, ultimately, objects of profit. The Commerce Clause proscribes state regulation which impedes the free flow of commerce across state lines. Consequently, regulations that attempt to hinder divestment of a state's natural resources destined for interstate commerce repeatedly have been struck down as an unconstitutional interference with interstate commercial undertakings.

Almost a century ago, the case of *Geer v. Connecticut*¹¹ addressed the issue of whether a Connecticut statute regulating the transportation of animals *ferae naturae*¹² out-of-state, after being lawfully killed within this state, violated the Commerce Clause of the Constitution. Edgar M. Geer was charged with and convicted of "unlawfully receiving and having in his possession . . . with the unlawful intent to procure the transportation beyond the limits of this state, certain woodcock, ruffed grouse and quail killed within this state"¹³

10. See *supra* note 5 for a discussion on interstate compacts.

11. 161 U.S. 519 (1896), *overruled*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

12. "Animals which are by nature wild are so designated, by way of distinction from such as are naturally tame. . . ." BLACK'S LAW DICTIONARY 558 (5th ed. 1979).

13. *State v. Geer*, 61 Conn. 144, 148-49, 22 A. 1012, 1012 (1891).

Relying primarily on English and French common law¹⁴ authorizing the regulation of hunting animals *ferae naturae* based upon the principle of common ownership,¹⁵ the right of a state to govern for the benefit of its people,¹⁶ and the concept that the game never entered the stream of interstate commerce, the Supreme Court affirmed Geer's conviction. The Court, in referencing *Gibbons v. Ogden*¹⁷ and *The*

14. Blackstone, interpreting English common law, wrote: "[I]t follows from the very end and constitution of society that this natural right [of man to pursue and take for his own use animals *ferae naturae*] . . . may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community." *Geer v. Connecticut*, 161 U.S. 519, 527 (1896) (quoting 2 W. BLACKSTONE, COMMENTARIES 410). The Napoleonic Code, symbolizing French common law, noted the implications of the common ownership doctrine: "There are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed." *Geer*, 161 U.S. at 526 (quoting NAPOLEANIC CODE arts. 714, 715).

15. The common ownership doctrine stipulates that natural resources: are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this 'ownership' for the benefit of its citizens Each government may . . . regulate the corpus of the trust in the way best suited to the interests of the beneficial owners, its citizens, and may discriminate as it sees fit against persons lacking any beneficial interest.

Toomer v. Witsell, 334 U.S. 385, 399-400 (1948). See also *Geer*, 161 U.S. 519.

16. The sole consequence of the provision forbidding the transportation of game, killed within the State, beyond the State, is to confine the use of such game to those who own it, the people of that State. The proposition that the State may not forbid carrying it beyond their limits involves, therefore, the contention that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose.

Geer, 161 U.S. at 529-30.

The Court, quoting from *Ex parte Maier*, reinforced its position:

The wild game within a state belongs to the people in their collective, sovereign capacity; It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic and commerce in it, if deemed necessary for its protection or preservation, or the public good.

Id. at 529 (quoting *Ex parte Maier*, 103 Cal. 476, 483, 37 P. 402, 404 (1894).

17. 22 U.S. (9 Wheat.) 1 (1824) (state grant of authority to operate steamboat

Daniel Ball,¹⁸ stated that the statute regulated Connecticut's internal commerce and had no effect on external commerce with other states. Therefore, there was no violation of the Commerce Clause which regulated commerce "among the several states."¹⁹

An early case which specifically addressed the interstate diversion of water was *Hudson County Water Co. v. McCarter*.²⁰ Justice Holmes, writing for the majority, affirmed the state court's issuance of an injunction against Hudson County Water Company's anticipated diversion of water from New Jersey to Staten Island, New York. Hudson County Water Company, a New Jersey corporation, had contracted with the City of New York to supply the borough of Staten Island with a minimum 3,000,000 gallons of water a day, which were to be diverted from the Passaic River in New Jersey through water mains across state lines to New York. New Jersey sued to enjoin performance of the contract which it saw as a clear violation of state law.²¹ Hudson argued the statute violated the Constitution in that it impaired the obligation of contracts, took property without due process of law, interfered with commerce between the states, denied the privileges of New Jersey citizens to citizens of other states, and denied citizens of other states equal protection of the law.²² Justice Holmes dismissed these contentions briefly with partial reliance on *Geer*.²³

The state courts had identified Hudson County Water Company as a "riparian proprietor,"²⁴ and as such, had "no right to divert waters

monopoly on New York waters declared unconstitutional as conflicting with Congressional power to regulate navigation).

18. 77 U.S. (10 Wall.) 557 (1871) (ships operating solely on *intrastate* waters could be regulated by Congress if those ships were transporting goods *interstate*).

19. U.S. CONST. art. I, § 8.

20. 209 U.S. 349 (1908).

21. The challenged New Jersey statute read: "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein." 1905 N.J. Laws 461. For the current statute on the subject of water diversion, see N.J. STAT. ANN. § 58:1A-5 (West 1982).

22. *Hudson*, 209 U.S. at 354.

23. 161 U.S. 519.

24. *Hudson*, 209 U.S. at 354. The riparian doctrine is a system of water law mainly followed in Great Britain and the eastern United States. It permits owners of land appurtenant to water to make reasonable use of the water and provides for a

for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount.”²⁵ Justice Holmes broadened the justification for the injunction, attributing its employment to the state’s police power: “The limits set to property by other public interests present themselves as a branch of what is called the police power of the State.”²⁶ The public interests cited by Justice Holmes included maintaining an undiminished river flow to protect the public health and welfare. “This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots.”²⁷ In emphasizing the sovereign’s

“correlative right protecting against unreasonable use by others that substantially diminishes the quantity or quality of water.” 7 R. CLARK, *WATERS AND WATER RIGHTS* 310 (1967 & Supp. 1978). The “water right is regarded as ‘usufructuary,’ a right of use and not an interest in the corpus of the water supply . . . [R]iparian rights originate from landownership and are dependent upon physical location, i.e., contiguity of land to a body of water Riparian rights . . . remain ‘vested’ though unexercised.” 1 R. CLARK, *WATERS AND WATER RIGHTS* § 51.9 (1967 & Supp. 1978).

25. *Hudson*, 209 U.S. at 354.

26. *Id.* at 355.

27. *Id.* at 356. Furthermore, Justice Holmes added that “it is recognized that the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.” *Id.* at 355, citing three cases:

(1) *Kansas v. Colorado*, 185 U.S. 125 (1902). This controversy between two states triggered the original jurisdiction of the United States Supreme Court. Kansas sought injunctive relief to bar Colorado from diverting waters from the Arkansas River which originated in Colorado but flowed through both Kansas and Colorado. The Supreme Court recognized the complexity of the issues and questions raised, overruled a demurrer by Colorado, and requested a factual presentation by both parties in order to rule effectively.

(2) *Kansas v. Colorado*, 206 U.S. 46 (1907). Facts were compiled and presented to the Supreme Court in this proceeding five years after the litigation was initiated. The Court dismissed Kansas’ complaint in a lengthy opinion which concluded that Kansas suffered minimally from Colorado’s water diversions resulting in diminution of river flow through Kansas. The Court felt that Colorado diverted water for a reasonable use — irrigation — and that there was an equitable apportionment of the Arkansas River waters between the two states.

(3) *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). This case involved an

independent authority, Justice Holmes claimed that the state need not justify its protective stance. "[The State] finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."²⁸

Despite Justice Holmes' views, however, the Court in *West v. Kansas Natural Gas Co.*²⁹ began to dismantle the state police power theory of control and ownership of natural resources. Kansas Natural Gas Company joined forces with three other complainants to attack an Oklahoma statute³⁰ regulating the interstate transport of natural gas as violative of the Commerce Clause. The complainants had secured the rights to construct natural gas wells on Oklahoma land and, in addition, had purchased the rights of way to lay pipes for the interstate

injunction issued in Georgia's favor against the public nuisance of air pollution from Tennessee Copper Company's out-of-state plant.

28. *Hudson*, 209 U.S. at 357. "[T]he constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs." *Id.* at 356-57. As previously discussed in the introduction and as will later be developed, population growth is a material factor in the argument for transfer of water to satisfy justifiable needs. Furthermore, the state, in attempting to enjoin interstate diversion/transfer of water, must justify its laws regulating such transfer, particularly under Commerce Clause analysis. *See, e.g., Sporhase v. Nebraska*, 102 S. Ct. 3456 (1982). *See supra* text accompanying notes 101-119.

29. 221 U.S. 229 (1911).

30. The Oklahoma statute, in part, read:

§ 2. No corporation organized for the purpose of, or engaged in the transportation or transmission of natural gas within this State shall be granted a charter or right of eminent domain, or right to use the highways of this State unless it shall be expressly stipulated in such charter that it shall only transport or transmit natural gas through its pipe lines to points within this State; that it shall not connect with, transport to, or deliver natural gas to individuals, associations, copartnership companies or corporations engaged in transporting or furnishing natural gas to points, places or persons outside of this State.

§ 3. Foreign corporations formed for the purpose of, or engaged in the business of transporting or transmitting natural gas by means of pipe lines, shall never be licensed or permitted to conduct such business within this State.

1907 Okla. Sess. Laws 586-87. *See West*, 221 U.S. at 239-43 n.1 for text of the statute in its entirety. For the current statute on the subject, see OKLA. STAT. ANN. tit. 52, §§ 1, 3, 4, 5, 7 (West 1969 & Supp. 1982-83).

transmission and eventual sale of the natural gas. The Oklahoma statute prohibited the transportation of natural gas over the state highways or transmission of the natural gas through pipelines within the state, to destinations outside the state. The Circuit Court of the United States for the Eastern District of Oklahoma issued a "perpetual" injunction against the statute's enforcement, declaring the statute's aims, as scrutinized under the authority of the Commerce Clause, "unreasonable, unconstitutional, invalid and void, and of no force or effect whatever. . . ." ³¹

On appeal to the United States Supreme Court, Oklahoma argued that "the statute's 'ruling principle is conservation, not commerce; that the due process clause is the single issue.' And due process, it is urged, is not violated, because the statute is not a taking of property, but a regulation of it under the police power of the State."³² Despite the state's effort, the Supreme Court affirmed the Circuit Court's decision, and articulated its rejection of the state's position:

The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of *intrastate* commerce and *interstate* commerce. The statute . . . recognizes [gas] to be a subject of *intrastate* commerce, but seeks to prohibit it from being the subject of *interstate* commerce, and this is the purpose of its conservation. In other words, the purpose of the conservation is in a sense commercial — the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine [the coal or timber] to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals To what consequences does such power

31. *West*, 221 U.S. at 248 (citing *Kansas Natural Gas Co. v. Haskell*, 172 F. 545 (C.C.E.D. Okla. 1909) (prior to 1912, the judicial system was structured differently. See C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 1, at 1-6 (1976)).

32. *West*, 221 U.S. at 249.

tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.³³

The objective of the Commerce Clause to foster the free flow of commerce among and between the states was clearly frustrated by the Oklahoma statute. Therefore, the statute was declared unconstitutional, and a permanent injunction issued against its operation.

The *West* Court highlighted the national concerns implicit in avoiding the creation of "embargo" legislation. Nonetheless, the controversy continued in *Pennsylvania v. West Virginia*,³⁴ this time on a larger scale between three states. Pennsylvania and Ohio sought a prohibitory injunction against the operation and enforcement of a West Virginia statute.³⁵ The statute recognized an anticipated depletion of natural gas resources within West Virginia and sought to prefer *intra*-state consumers as the supply diminished. Again, this attempted restraint of "an established current of commerce"³⁶ was challenged as forbidden by the Commerce Clause. At the time, West Virginia was the leading producer of natural gas in the United States and had nurtured and promoted its position by developing an *intrastate*, as well as *interstate*, market.³⁷ For years before the suit, the bordering states of Pennsylvania and Ohio relied heavily on West Virginia gas for private and public consumption.³⁸ As its gas fields began to show signs of ex-

33. *Id.* at 255 (emphasis added).

34. 262 U.S. 553 (1923).

35. 1919 W. Va. Acts ch. 71.

36. *Pennsylvania v. West Virginia*, 262 U.S. at 591.

37. *Id.* at 597-98.

Much of the business is interstate and has grown up through the course of years. West Virginia encouraged and sanctioned the development of that part of the business and has profited greatly by it. Her present effort, rightly understood, is to subordinate that part to the local business within her borders. In other words, it is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do.

Id.

38. "In West Virginia the production of natural gas began as much as thirty years ago and for the last fourteen years has been greater than in any other State. The producing fields include thirty-two of her fifty-five counties." *Id.* at 586. The Court also noted that the gas was used by 300,000 consumers and ultimately provided for 1,500,000 persons in Pennsylvania and 725,000 consumers, ultimately 3,625,000 per-

haustion, West Virginia moved to protect local needs. It exhibited a preference for its inhabitants in the purchase and sale of the resource by withdrawing "a large volume of the gas from an established interstate current whereby it is supplied in other States to consumers there."³⁹

The Court recognized the probable ramifications of the statute's enforcement,⁴⁰ but avoided those negative results by relying on the purpose behind the Commerce Clause and prior case law including *West*.⁴¹ The injunction was issued and the Court advised that if interstate regulation of natural gas was necessary, assistance should be sought from Congress.

Justice Holmes vigorously dissented here, as in *West*, promoting his notion of a state's police power to control its resources. "I see nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages."⁴² Justice Holmes, echoing his opinion in *Hudson County Water Co. v. McCarter*,⁴³ emphasized the right of the state to provide for its local needs.

Although not a "natural resources" case, *H.P. Hood & Sons, Inc. v. DuMond*⁴⁴ offered an analysis of the Commerce Clause, helpful to the understanding of the "resources" controversy. The seminal case of its time, *Hood*, surveyed the field of Commerce Clause litigation and

sons, in Ohio. "To change to other fuel would require an adjustment of heating and cooking appliances at an average cost of more than \$100 for each domestic consumer, or an aggregate cost exceeding \$30,000,000 in Pennsylvania and \$72,500,000 in Ohio." *Id.* at 590.

39. *Id.* at 595.

40. *Id.* at 596.

The question is an important one; for what one State may do others may, and there are ten States from which natural gas is exported for consumption in other States. Besides, what may be done with one natural product may be done with others, and there are several States in which the earth yields products of great value which are carried into other States and there used.

Id.

41. 221 U.S. 229.

42. *Pennsylvania v. West Virginia*, 262 U.S. at 602.

43. 209 U.S. 349 (1908).

44. 336 U.S. 525 (1949).

emphasized the national economic interest as more imperative than the state's internal economic preoccupation. The Hood Company, a milk distributor, was denied a license by the New York Commissioner of Agriculture and Markets to open and operate an additional distribution plant at Greenwich, New York. Hood purchased raw milk from farmers, which it then tested, weighed, and cooled for eventual shipment. It was conceded that Hood's entire business, both present and future, was interstate.⁴⁵

In denying the license, the New York Commissioner guided by state law, concluded: "The issuance of a license to [the] applicant which would permit it to operate an additional plant, would tend to a destructive competition in a market already adequately served, and would not be in the public interest."⁴⁶ Justice Cardozo, writing for a unanimous Court in the earlier case of *Baldwin v. G.A.F. Seelig, Inc.*,⁴⁷ had struck down a New York statute which attempted to bar the importation of milk from Vermont. The legislation was declared an unconstitutional burden on interstate commerce. Justice Jackson, writing for the majority in *Hood*, compared *Baldwin* and found the facts there to be the converse of *Hood*, but the principles to be identical. *Baldwin* involved the attempted curtailment of importation, while *Hood* involved a similar restraint on the exportation of a commodity. "In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competition."⁴⁸

Justice Jackson, referencing Justice Cardozo's view in *Baldwin*, noted the economic mission of the *Hood* statute, as distinguished from a legitimate objective of guarding the health, safety, and welfare of a state's citizens. It was this economic objective, in light of the Commerce Clause and its functions, which was precisely at "the root of its invalidity."⁴⁹ In examining the early history of the Commerce Clause, Justice Jackson found that "[t]he desire of the Forefathers to federalize regulation of foreign and interstate commerce [stood] in sharp contrast to their jealous preservation of the state's power over its internal

45. *Id.* at 526.

46. *Id.* at 529.

47. 294 U.S. 511 (1935).

48. *Hood*, 336 U.S. at 531.

49. *Id.* at 532.

affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished."⁵⁰

Justice Cardozo in *Baldwin* had marked the parameters limiting state regulation: "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."⁵¹ Justice Jackson, in *Hood*, noted the probable consequences of "embargo" statutes as the result of the "established interdependence of the states" ⁵² He foresaw states coveting their treasures of copper, timber, ore, cotton, oil, and gas. "What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!"⁵³

By the mid 1960's, conservation of our natural resources was a national concern. Although the country had experienced incidental water shortages throughout the first half of the century, the first meaningful water related case following the 1908 dispute in *Hudson*,⁵⁴ was *City of Altus v. Carr*⁵⁵ in 1965. The controversy stemmed from a Texas statute⁵⁶ limiting the transport of water to other states and an Oklahoma city's dire need of outside water supplies.⁵⁷

An engineering firm, hired by the city of Altus, Oklahoma to locate alternative sources of water, recommended tapping the subsurface water reserve under six of the 5,663 contiguous acres of Texas land owned by plaintiffs C.F. and Pauline Mock. The land bordered Oklahoma and was fourteen miles from the city of Altus. The city of Vernon, Texas, just south of the Mocks' land, was already drawing

50. *Id.* at 533-34.

51. *Baldwin*, 294 U.S. at 527.

52. *Hood*, 336 U.S. at 538.

53. *Id.* at 538-39.

54. 209 U.S. 349.

55. 255 F. Supp. 828 (W.D. Tex.), *aff'd mem.*, 385 U.S. 35 (1966).

56. The statute stated: "No one shall withdraw water from any underground source in this State by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it." TEX. STAT. ANN. art. 7477b (Vernon 1965). Statute held void in *City of Altus*, 255 F. Supp. 828, and therefore omitted from TEXAS WATER CODE ANN. § 5.096 (Vernon 1972 & Supp. 1982-83).

57. The City of Altus, Oklahoma experienced a rapid population boom from 9,735 persons in 1959 to approximately 23,500 persons at the time of suit in 1966. *City of Altus*, 255 F. Supp. at 831 n.3. Available water supplies from the W.C. Austin Project of the United States Bureau of Reclamation were limited. *Id.* at 831.

from this "natural subsurface water-bearing formation"⁵⁸ of high quality percolating ground water. The Mocks and the city of Altus executed a lease which granted the city of Altus the land "for the sole and only purpose of mining and operating for subsurface water and for the transportation of such water to the city of Altus for its use."⁵⁹ Two months later, the Texas legislature enacted article 7477b⁶⁰ which effectively barred interstate transfer of water unless the state legislature first approved the transfer. Thereafter, plaintiffs Mock and the city of Altus filed suit to permanently enjoin enforcement of the Texas statute as violative of the Commerce Clause. The Texas state courts had previously addressed intrastate water rights,⁶¹ thereby providing some guidance for the federal district court.

The federal district court reiterated the views expressed in *Pennsylvania v. West Virginia*⁶² and *West v. Kansas Natural Gas Co.*⁶³ in finding for the plaintiffs. Water, like gas, when reduced to possession was considered personal property — a commodity — free for sale in *intrastate* or *interstate* commerce. Regulation restraining transportation of a commodity was not tolerated under the Commerce Clause and its theme proscribing burdening and interfering with interstate commerce. Texas' argument that the statute's intentions were lawful as an exercise of the state's police power in the interest of conservation was discarded.⁶⁴ The court eliminated any distinction between a statute

58. *Id.* at 831.

59. *Id.* at 832.

60. TEX. STAT. ANN. art. 7477b (Vernon 1965). Statute held void in *City of Altus*, and therefore omitted from TEX. WATER CODE ANN. § 5.096 (Vernon 1972 & Supp. 1982-83).

61. *City of Altus*, 255 F. Supp. at 832 n.8. *See, e.g., City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955) (declaring that the rule in Texas permitted a landowner to withdraw as much percolating ground water as necessary for beneficial aims and could thereafter market it as that landowner saw fit).

62. 262 U.S. 553.

63. 221 U.S. 229.

64. *City of Altus*, 255 F. Supp. at 840.

In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant . . . Obviously, the statute had little relation to the cause of conservation.

Id.

which restrained the movement of an article in interstate commerce once reduced to personal property and possession and a statute which prohibited the withdrawal of ground water, for example, with the intent to transport it interstate.⁶⁵

Natural Resources and the Privileges and Immunities Clause

In addition to the Commerce Clause, the Privileges and Immunities Clause of Article IV of the Constitution⁶⁶ has been asserted as a basis from which to contest state laws aimed at coveting natural resources solely for *intrastate* use. An early case which considered the Privileges and Immunities Clause as related to state regulation of natural resources was *McCready v. Virginia*.⁶⁷ The common or public ownership doctrine discussed in *Geer v. Connecticut*,⁶⁸ was also the topic of controversy in *McCready*. The Supreme Court upheld the conviction of McCready, a Maryland citizen, for his violation of a Virginia statute⁶⁹ which prohibited out-of-state citizens from planting oysters in or taking oysters from Virginia waters. The Court upheld the statute stating that “[t]he right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.”⁷⁰

For further guidance in its interpretation and application of the Privileges and Immunities Clause of Article IV, the Court turned to *Corfield v. Coryell*,⁷¹ in which it was established that “those privileges and immunities which are, in their nature, fundamental . . . belong, of

65. *Id.*

66. U.S. CONST. art. IV, § 2, provides in part: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

67. 94 U.S. 391 (1876).

68. 161 U.S. 519 (1896). *See also supra* note 15 for discussion of the common ownership doctrine.

69. The Virginia statute read, in part: “If any person other than a citizen of this State shall take or catch oysters . . . or plant oysters in the waters thereof . . . he shall forfeit \$500, and the vessel, tackle, and appurtenances.” 1874 Va. Acts 214.

70. *McCready*, 94 U.S. at 395. The Court also rejected the notion that the Virginia statute was an impermissible burden on interstate commerce. *Id.* at 396-97.

71. 6 F. Cas. 546 (C.C.E.D. Pa. 1823)(No. 3230) (access to oyster beds “owned” by New Jersey citizens could be limited solely to New Jersey citizens).

right, to the citizens of all free governments . . . ”⁷² and were meant to be protected by the Clause. The Pennsylvania statute in *Corfield*, like the Virginia statute in *McCready*, established “that it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this state, to rake or gather clams, oysters, or shells, in any of the rivers, bays, or waters in this state”⁷³ The *Corfield* Court concluded not only that the state could regulate the fisheries within the state’s borders under the common ownership theory, but also that farming oysters was not considered a “fundamental” privilege of the citizens of all states.⁷⁴

The *McCready* Court, influenced by the *Corfield* approach, concluded “that the citizens of one State [were] not invested by [the Privileges and Immunities] clause of the Constitution with any interest in the common property of the citizens of another State.”⁷⁵ As in *Corfield*, the Court rejected employment of the Commerce Clause to bolster the challenge against the enforcement of the state statute: “There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade.”⁷⁶

72. *Corfield*, 6 F. Cas. at 551.

73. Act of June 9, 1820, *quoted in Corfield*, 6 F. Cas. at 548.

74. *Corfield*, 6 F. Cas. at 552. The Court said:

[The fishery] is the property of all [citizens or subjects of the state]; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent . . . of the sovereign who has the power to regulate its use.

. . . [I]t would . . . be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other states. . . . The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe.

Id.

75. *McCready*, 94 U.S. at 395.

76. *Id.* at 396.

In addition to *McCready* and *Corfield*, the Privileges and Immunities Clause was extensively examined in the *Slaughterhouse Cases*⁷⁷ where the Louisiana Legislature created a corporation which monopolized the slaughtering of livestock. Approximately 1000 butchers unsuccessfully challenged the statute as an unconstitutional abridgement of their rights under the privileges or immunities clause of the fourteenth amendment.⁷⁸ The majority of the Court concluded that the fourteenth amendment protected only those privileges and immunities inherent in United States citizenship, as opposed to the privileges or immunities of state citizenship.⁷⁹ The Court examined the fourteenth amendment and said:

It is a little remarkable, if this clause [No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*] was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.⁸⁰

77. 83 U.S. (16 Wall.) 36 (1873). See *supra* note 66 for the text of the Privileges and Immunities Clause of Art. IV.

78. *Slaughterhouse*, 83 U.S. (16 Wall.) at 66. U.S. CONST. amend XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute was also challenged as an unconstitutional creation of an involuntary servitude prohibited by the thirteenth amendment, and a denial of equal protection and deprivation of property without due process of law contrary to the proscriptions of the fourteenth amendment. *Slaughterhouse*, 83 U.S. (16 Wall.) at 66.

79. *Slaughterhouse*, 83 U.S. (16 Wall.) at 73-74.

80. *Id.* at 74. Professor Tribe interpreted the Court's analysis:

The fourteenth amendment retained the distinction between the privileges of state citizenship and those of national citizenship; therefore, the Court reasoned, the fourteenth amendment left responsibility over the fundamen-

The Supreme Court recently discussed the Privileges and Immunities Clause in *Baldwin v. Fish & Game Commission of Montana*,⁸¹ where a Montana resident and hunting guide for nonresident hunters joined with several Minnesota residents to challenge the Montana licensing scheme applicable to nonresident hunters. Montana residents were able to purchase hunting licenses for substantially less cost than nonresident hunters.⁸² Consequently, the statute was attacked as a violation of the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

Justice Blackmun, writing for the majority, noted the scant litigation and judicial analysis involving the Privileges and Immunities Clause. Nonetheless, Justice Blackmun formulated what was in his view the modern articulation of the Clause's purpose and protections:

Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the nation as a single entity must the State treat all citizens, resident and nonresident, equally.⁸³

tal rights of state citizenship where it had always rested, in the state governments. Since the privilege claimed by the *Slaughterhouse* plaintiffs numbered among the rights of state citizenship, they were told to look to Louisiana for redress: the privileges or immunities clause provided federal protection only for the rights of *national* citizenship.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 7-2, at 419 (1978 & Supp. 1979).

The Court suggested some privileges and immunities of national citizenship "which owe their existence to the Federal Government, its National character, its Constitution, or its laws." For an enumeration, see *Slaughterhouse*, 83 U.S. (16 Wall.) at 79-80.

81. 436 U.S. 371 (1978).

82. In 1975, a Montana resident paid \$4 for a license to hunt only elk. A nonresident hunter, on the other hand, paid \$151 for a combination license which limited him to kill only one elk and two deer. In 1976, a Montana resident had the choice between a combination license for \$30 or an elk license for \$9, while the nonresident hunter was required to purchase a combination license only, for \$225. *Id.* at 373-74.

83. *Id.* at 383.

Justice Blackmun did not conclude that the Montana elk hunting licensing scheme upset the “formation” or “vitality” of the nation, nor did he consider the issue one of “fundamental,” “natural,” “basic,” or “essential” rights.⁸⁴ Moreover, Justice Blackmun did not concede the public ownership theory as defunct despite the weakening effect of extensive Commerce Clause litigation. Although Justice Blackmun admitted the theory was “by no means absolute,”⁸⁵ he found its vitality evident in *Baldwin*: “The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.”⁸⁶

Justice Brennan, joined in his dissent by Justices White and Marshall, was uncomfortable with the majority’s emphasis on the “fundamental rights” view of the Privileges and Immunities Clause.⁸⁷ Justice

84. *Id.* at 387. In Justice Blackmun’s words, only “[w]ith respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions.” *Id.*

85. *Id.* at 385.

86. *Id.* at 388.

87. The dissenters’ discomfort is exemplified through the following comments: “Corfield’s view of the Privileges and Immunities Clause might, and should be, properly interred as the product of a bygone era” *Id.* at 399 (Brennan, J., dissenting). Moreover:

The Court concludes that because elk hunting is not a ‘basic and essential activit[y], . . .’ the Privileges and Immunities Clause of Article IV, § 2 . . . does not prevent Montana from irrationally, wantonly, and even invidiously discriminating against nonresidents seeking to enjoy natural treasures it alone possesses. I cannot agree that the Privileges and Immunities Clause is so impotent a guarantee that such discrimination remains wholly beyond the purview of that provision.

Id. at 394.

Furthermore, Justice Blackmun’s “fundamental rights” view of the Privileges and Immunities Clause has been challenged and a modern enunciation of its implications noted:

Toomer v. Witsell dramatically shifted the focus of review under the privileges and immunities clause from categorizing fundamental rights of state citizenship to analyzing state justifications for maintaining the challenged discriminatory burdens. A flexible approach that seeks to allow discrimination but only where necessary was substituted for the rigidity inherent in a test that cast down any discrimination once found to diminish a fundamental right of state citizenship.

Brennan stressed that the burden was on the state to demonstrate a "substantial reason for the discrimination beyond the mere fact that they are citizens of other States."⁸⁸

Toomer v. Witsell,⁸⁹ relied on by the dissent in *Baldwin*, involved a South Carolina shrimping statute which, among other requirements, imposed a license fee on nonresidents 100 times as costly as the fee for residents.⁹⁰ Earle J. Toomer and five other Georgia fishermen, renouncing the statute's "purpose and effect," claimed the statute was not meant "to conserve shrimp, but to exclude non-residents and thereby create a commercial monopoly for South Carolina residents."⁹¹ Despite South Carolina's conservation position, the Court in *Toomer* struck down the South Carolina statute because the state had failed to overcome the constitutional challenge under the Privileges and Immunities Clause.⁹² The state had neglected to persuade the Court that: "(1) the presence or activity of nonresidents [was] the source or cause of the problem or effect with which the State [sought] to deal, (2) the discrimination practiced against nonresidents [bore] a substantial relation to the problem they present,"⁹³ and (3) "the actual impracticality of apparent and *less restrictive alternatives*."⁹⁴

Furthermore, Justice Brennan challenged the residual vitality of the public/common ownership property doctrine as the result of its qualification in *Toomer*; that is, "[t]he whole ownership theory, in fact, [was] . . . generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to pre-

L. TRIBE, *supra* note 80, § 6-33, at 410.

88. *Baldwin*, 436 U.S. at 399-400 (Brennan, J., dissenting) (citing *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). The Privileges and Immunities Clause "was designed to insure to a citizen of State A who venture[d] into State B the same privileges which the citizens of State B enjoy." *Baldwin*, 436 U.S. at 399 (quoting *Toomer*, 334 U.S. at 395). Accordingly, the State first has to justify its attempted discriminatory practice.

89. 334 U.S. 385.

90. 1947 S.C. Acts 281.

91. *Toomer*, 334 U.S. at 395.

92. *Id.* at 403. The statute was also declared unconstitutional as a violation of the Commerce Clause. *Id.* at 406.

93. *Baldwin*, 436 U.S. at 402 (Brennan, J., dissenting). See *Toomer*, 334 U.S. at 396-99.

94. L. TRIBE, *supra* note 80, § 6-33, at 410. See *Toomer*, 334 U.S. at 396-99.

serve and regulate the exploitation of an important resource.”⁹⁵

Immediately following *Baldwin*, Justice Brennan grasped the opportunity to dispose of the common ownership doctrine in *Hughes v. Oklahoma*.⁹⁶ William Hughes, who operated a commercial minnow business in Texas, was convicted of violating an Oklahoma statute which prohibited the commercial exportation of natural minnows from Oklahoma streams. Hughes challenged the statute as repugnant to the Commerce Clause.

In his majority opinion, Justice Brennan agreed that the Oklahoma statute violated the Commerce Clause, and rejected the state's reliance on the common ownership rationale. This effectively overturned the decision in *Geer v. Connecticut*⁹⁷ almost a century earlier. Justice Brennan, in his step-by-step dismantling of the *Geer* common/public/state ownership doctrine, identified the state's “protectionist motive,”⁹⁸ condemned in *West v. Kansas Natural Gas Co.*,⁹⁹ as the basis for the demise of *Geer*. Justice Brennan saw the Privileges and Immunities Clause analysis applied in *Baldwin*,¹⁰⁰ which had shed doubt on the vitality of *Geer*, as analogous to the *Hughes* Commerce Clause challenge.¹⁰¹

95. *Toomer*, 334 U.S. at 402. The erosion of the common ownership doctrine can be seen in *Missouri v. Holland*, 252 U.S. 416, 434 (1920) where it was said: “To put the claim of the State upon title is to lean upon a slender reed.” See also *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977) where it was said:

A state does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of ‘owning’ wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture . . . Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.

Id. at 284-85. In essence, it appears that the common ownership doctrine of natural resources is no more than a slogan employed by the inhabitants of a state to covet its treasures despite the real need of others.

96. 441 U.S. 322 (1979).

97. 161 U.S. 519 (1896).

98. *Hughes*, 441 U.S. at 329.

99. 221 U.S. 229 (1911).

100. 436 U.S. 371.

101. *Hughes*, 441 U.S. at 334. See also *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978), where Justice Brennan said there is a “mutually reinforcing relationship be-

Justice Brennan also utilized a functional approach to declare the Oklahoma statute regulating the interstate transfer of minnows facially discriminatory, and therefore unconstitutional. This approach had been utilized before in *Pike v. Bruce Church, Inc.*¹⁰² where the Bruce Church company grew, harvested, processed, and packed fruits and vegetables at various plants throughout Arizona and California for ultimate shipment in interstate commerce throughout the nation. The company employed its California facilities for packing cantaloupes harvested in Arizona. Bruce Church, Inc. commenced an action in federal court to enjoin the operation of the Arizona Fruit and Vegetable Standardization Act, which in part required that "all cantaloupes grown in Arizona and offered for sale must 'be packed in regular compact arrangement in closed standard containers approved by the supervisor'"¹⁰³ The effect of the Arizona statute was to bar the Bruce Church company from continued transportation of its cantaloupes, harvested in Arizona, to its packing facilities in California.

In striking down the Arizona statute as unconstitutional under the authority of the Commerce Clause, the Supreme Court announced a more precise rule for purposes of determining the constitutionality of state statutes in Commerce Clause litigation:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.¹⁰⁴

tween the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause " *Id.*

102. 397 U.S. 137 (1970).

103. *Id.* at 138.

104. *Id.* at 142 (citation omitted). The Court determined, based on this test, that the Arizona statute burdened interstate commerce:

[T]he State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded \$200,000 packing

Justice Brennan, in *Hughes*, focused on the *Pike* approach and noted that the Oklahoma statute banning the interstate transportation of minnows from Oklahoma streams “overtly block[ed] the flow of interstate commerce at [the] state’s borders.”¹⁰⁵ Furthermore, Justice Brennan stated that a facially discriminatory statute, like Oklahoma’s, cannot be sanctioned regardless of the state’s attempted justification for its enforcement, because “the evil of protectionism can reside in legislative means as well as legislative ends.”¹⁰⁶

Sporhase v. Nebraska: Water as an Article of Commerce

Understanding the judicial treatment of the interstate transfer of natural resources is paramount to recognizing the impact of the United States Supreme Court decision in *Sporhase v. Nebraska*.¹⁰⁷ Until *Sporhase*, water was not readily thought of as an article of commerce; rather, it was widely recognized as a vital natural resource necessary for economic prosperity and human survival. The Court in *Sporhase* classified water as both an article of commerce — thereby bringing it within the purview of the Commerce Clause — and as a natural resource.

The *Sporhase* controversy grew out of a conflict between private need for water and provisions in the Nebraska statutes which read as follows:

Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources

plant in [Arizona]. . . . For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.

Id. at 145.

105. *Hughes*, 441 U.S. at 337 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

106. *Hughes*, 441 U.S. at 337 (quoting *Philadelphia v. New Jersey*, 437 U.S. at 626).

107. 102 S. Ct. 3456 (1982).

to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.¹⁰⁸

In *Sporhase*, two citizens of Colorado, Joy Sporhase and Delmer Moss, owned contiguous tracts of land in Nebraska and Colorado. From a well situated on their Nebraska land, Sporhase and Moss pumped ground water to irrigate both the Nebraska and Colorado tracts. They did not seek the required Nebraska permit to transport water across state lines prior to pumping. Consequently, the State of Nebraska sued in state court to enjoin Sporhase and Moss from withdrawing ground water from their well on the Nebraska tract for transport out-of-state. Despite Sporhase's and Moss' defense that the Nebraska statute violated the Commerce Clause, the trial court issued an injunction upon concluding that ground water was *not* an article of commerce.

The Nebraska Supreme Court affirmed¹⁰⁹ and thereby adopted the trial court's reasoning that, even if water was an article of commerce, the statute did not "impose an unreasonable burden [on] interstate commerce."¹¹⁰ In its examination of Nebraska law, the court explained that Nebraska had employed the modified American reasonable use rule governing the rights of water "ownership."¹¹¹ In essence, the

108. NEB. REV. STAT. § 46-613.01 (1978).

109. *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *rev'd sub nom. Sporhase v. Nebraska*, 102 S. Ct. 3456 (1982).

110. *Douglas*, 208 Neb. at 705, 305 N.W.2d at 616.

111. *Id.* at 705, 305 N.W.2d at 617 (citing *Olson v. City of Wahoo*, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933)).

The American [reasonable use] rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning.

state's highest court advocated public ownership of water. The court dismissed appellants' reliance on *City of Altus v. Carr*,¹¹² pointing out that Texas law, in contrast to Nebraska law, had adopted the English common law rule of absolute ownership in water.¹¹³ Furthermore, the court distinguished other "natural resource" cases as dealing with resources which "have historically been market items, reducible to private possession and freely exchangeable for value."¹¹⁴

On appeal to the United States Supreme Court, the tables turned; the State of Nebraska was unable to overcome the Court's characterization of water as an article of commerce. The Court indicated that the "States' interest [in water] clearly [had] an interstate dimension,"¹¹⁵

Id.

Compare other major riparian rights doctrines applicable to ground water such as the English Rule, which "recognizes absolute ownership of ground water in the overlying land owner." *Douglas*, 208 Neb. at 705, 305 N.W.2d at 617; and the Prior Appropriation Doctrine, which is a system of water law dominant in most western states. The basic tenets of the doctrine are priority of right (first in time, first in right) and actual use of the water appropriated. Appropriative rights are lost by nonuse. See 1 R. CLARK, WATERS AND WATER RIGHTS §§ 51.5-51.9 (1967 & Supp. 1978).

In an attempt to further control and enforce the alleged state "conservation" objectives, the Nebraska Legislature supplemented Nebraska's judicially imposed modified American reasonable use rule of ground water rights with: (1) the Nebraska statute in controversy, NEB. REV. STAT. § 46-613.01 (1978), and (2) inclusion of the state's recognition of its conservation aims in the state constitution. See NEB. CONST. art. XV, § 4 which reads: "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want." See *Douglas*, 208 Neb. at 706, 305 N.W.2d at 617. See also *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 801, 140 N.W.2d 626, 637 (1966) in which the Nebraska Supreme Court held it is "the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use."

112. 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd mem.*, 385 U.S. 35 (1966).

113. *Douglas*, 208 Neb. at 708-09, 305 N.W.2d at 618. "Ground water use is not an unlimited private property right in Nebraska law." *Id.* Cf. *City of Altus v. Carr*, 255 F. Supp. at 840: "[T]he general law of . . . Texas . . . recognizes water that has been withdrawn from under ground sources as personal property and subject to sale and commerce"

114. *Douglas*, 208 Neb. at 709-10, 305 N.W.2d at 619. The court, with little elucidation, said "water is the only natural resource absolutely essential to human survival," and therefore, rules governing the free flow of commerce in "less essential resources" ought not be applied, if at all, to water. *Id.* at 710, 305 N.W.2d at 619.

115. *Sporhase v. Nebraska*, 102 S. Ct. 3456, 3462 (1982).

despite the State's repeated argument that water was different from other natural resources. Justice Stevens specifically stressed the "*significant federal interest in conservation as well as in fair allocation of this diminishing resource.*"¹¹⁶

The Court was clearly not in harmony with Nebraska's persistence that water regulation was not to be scrutinized under the auspices of the Commerce Clause. Although the Court acknowledged and assented to limited state regulation, particularly in the water-scarce western states, those states were to achieve their goals of conservation and preservation within the parameters of the Constitution.¹¹⁷

After establishing the pertinence of the Commerce Clause, the Court employed the *Pike*¹¹⁸ test to determine the constitutionality of the Nebraska statute. The Court agreed that conservation was a legitimate local ambition, identified similar water transport restrictions in-

116. *Id.* at 3463 (emphasis added). The following are Justice Stevens' remarks in their entirety:

Although water is indeed essential for human survival, studies indicate that over 80% of our water supplies is used for agricultural purposes. The agricultural markets supplied by irrigated farms are worldwide. They provide the archtypical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation. The multistate character of the Ogallala aquifer — underlying appellants' tracts of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas — confirms the view that there is a *significant federal interest in conservation as well as in fair allocation of this diminishing resource.*

Id. at 3462-63 (emphasis added). "An aquifer is a geological formation or structure that transmits water." 5 R. POWELL, POWELL ON REAL PROPERTY 415 (1981 & Supp. 1982).

117. *Sporhase*, 102 S. Ct. at 3463.

But appellee's claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burden-on-commerce analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation If Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws. *Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.*

Id. (citations omitted, emphasis added).

118. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

trastate, and yielded to Nebraska's "limited preference for its own citizens in the utilization of the resource."¹¹⁹ The *Sporhase* Court concluded that the first three conditions of section 46-613.01 of the Revised Statutes of Nebraska — i.e., that the requested withdrawal of ground water was to be reasonable, not contrary to conservation aims, and not detrimental to the public welfare — did not "impermissibly burden interstate commerce."¹²⁰ However, the fourth statutory requirement of reciprocity was declared facially discriminatory and, as such, subject to the "strictest scrutiny." Recognizing that Colorado did not permit the exportation of its ground water to other states, the Court found that "the reciprocity provision operate[ed] as an explicit barrier to commerce between the two States," and was therefore a violation of the Commerce Clause.¹²¹

119. *Sporhase*, 102 S. Ct. at 3464.

120. *Id.* at 3465.

121. *Id.* "Because of the reciprocity requirement of § 46-613.01, appellants would not have been granted a permit had they applied for one." *Id.* at 3458 n.2. The Court also stated: "We therefore are not persuaded that the reciprocity requirement — when superimposed on the first three restrictions in the statute — significantly advances the State's legitimate conservation and preservation interest; it surely is not tailored to serve that purpose." *Id.* at 3465. The Nebraska Supreme Court decision was reversed and the case remanded to determine if the reciprocity provision could be severed from the statute.

Judgment of severance was issued on February 11, 1983 by the Nebraska Supreme Court. *State ex rel. Douglas v. Sporhase*, No. 43206 (Neb. S. Ct. filed Feb. 11, 1983). The court concluded that the unconstitutional reciprocity clause could be severed after consideration of the following criteria: (1) whether a "workable plan" remained following severance of the unconstitutional reciprocity provision; (2) whether the invalid reciprocity provision constituted an "inducement" to the enactment of § 46-613.01 and the overall objectives of Chapter 46 (Irrigation), article 6 (Ground Water); (3) whether the severance "would frustrate the intent of the [Nebraska] Legislature"; (4) whether a statement of severability was "included in the act, indicating that the legislature would have enacted the bill absent the invalid portion." *Id.* at 351-52. The court announced its decision:

An examination of Chapter 46, article 6, reveals a comprehensive approach to the conservation and beneficial use of ground water. The striking of the provision prohibiting transfer of water to nonreciprocating states does not weaken or otherwise impair the operation of the act The remainder of § 46-613.01, after the unconstitutional portion is stricken, remains a viable statute.

Id. at 352-53.

The Court also pointed out that the Nebraska statute, particularly the reciprocity provision, unconditionally prohibited the interstate transfer of water even if an abundance of available water existed and even though the most beneficial use of the resource might have existed out-of-state. With this in mind, the Court found the only way a state could justify its conservation-preservation program, via an absolute statutory embargo scheme, would be to prove: (1) the entire state experienced a water shortage, (2) *intrastate* transportation of water from locations of plentiful reserves to locations of scant supplies was feasible, and (3) importation of water would compensate for the exportation of water. Nebraska did not furnish such evidence; therefore, the reciprocity provision was struck down as not reflecting a "close fit" with asserted state objectives.¹²²

Although recognizing that past cases, statutes, and interstate agreements support Congressional deference to state water laws and policies in some circumstances,¹²³ the Court moreover rejected Nebraska's "suggestion that Congress ha[d] authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water. . . ."¹²⁴

Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal

122. *Sporhase*, 102 S. Ct. at 3465. Through application of the Commerce Clause, the Court is able to check unbridled state regulation of state water resources.

123. Nebraska cited 37 statutes, particularly the 1902 Reclamation Act which in part "mandates that questions of water rights that arise in relation to a *federal project* are to be determined in accordance with state law." *Id.* at 3466 (emphasis added)(citing *California v. United States*, 438 U.S. 645 (1978), considering whether a state may impose conditions on the United States Department of the Interior's appropriation of water for a federal reclamation project). Nebraska also referred the Court to various interstate compacts "regarding rights to *surface water*" as evidence of Congressional deference to state water laws. *Sporhase*, 102 S. Ct. at 3466 (emphasis added).

124. *Id.* at 3465.

water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress has consented to the unilateral imposition of unreasonable burdens on commerce.¹²⁵

Justice Rehnquist, joined by Justice O'Connor in his dissent, pointed to turn-of-the-century case law in his attempt to bolster the view that a state has the independent authority to manage its natural resources.¹²⁶ "In the exercise of this authority, a State may so regulate a natural resource so as to preclude that resource from attaining the status of an 'article of commerce' for the purposes of the negative impact of the Commerce Clause."¹²⁷ Under the purview of Nebraska's ground water law¹²⁸ — which, according to the dissent, recognized only a "usufructuary right"¹²⁹ to ground water — Justice Rehnquist suggested that "[c]ommerce' [could not] exist in a natural resource that [could not] be sold, rented, traded, or transferred, but only *used* Nebraska so regulates ground water that it cannot be said that the State permits any 'commerce,' intrastate or interstate, to exist in this natural resource."¹³⁰

Current Litigation and Policy

Most of what has been written regarding water transfers and shortages has primarily concerned the western portion of the United States.¹³¹ Because of the continuous attention drawn to the western water problem, relatively little concern has been shown for the water crises plaguing the largely populated urban centers of the eastern states. These areas have suffered critical and alarmingly frequent shortages which have triggered water use restrictions.¹³²

125. *Id.* at 3466.

126. *Id.* at 3468.

127. *Id.*

128. *See supra* note 111 and accompanying text.

129. *Sporhase*, 102 S. Ct. at 3468.

130. *Id.*

131. *See, e.g., Note, Interstate Transfer of Water: The Western Challenge to the Commerce Clause*, 59 TEX. L. REV. 1249 (1981).

132. *See generally* N.Y. Times, Nov. 11, 1982, at B1, col. 1; Canby, *Our Most*

The *Sporhase* controversy is the tip of the iceberg, signalling future litigation involving the access rights of arid regions versus the protectionist measures of the water-rich areas. For example, in *City of El Paso v. Reynolds*,¹³³ the city of El Paso, Texas sued to challenge New Mexico's absolute water "embargo" statute.¹³⁴ It challenged the statute as violative of the Commerce Clause on four grounds: (1) that New Mexico's minimal *intrastate* water restrictions and regulations did not illustrate a concern for conservation, (2) that New Mexico's regulations

Precious Resource: Water, 158-2 NATIONAL GEOGRAPHIC 144 (August 1980). To many, Florida is seen as a tropical environment, and consequently, one assumes the existence of an abundance of water. Few people realize Florida's grave concern for a continued *fresh* water supply. This was exhibited during the severe droughts of 1980 and 1981 when Floridians witnessed the water level of Lake Okeechobee, a major depository of Florida's fresh water reserves, drop to alarmingly low levels. Victoria Tschinkel, head of the Florida Department of Environmental Regulation, has said that the water problem:

will tear the state apart politically There is a tension over the realization that in the long run there will be a struggle between agricultural and phosphate interests versus the urban areas that are growing very rapidly and generally . . . in areas that are running out of water. Coastal wells are being shut down because of salt water intrusion. They'll have to go inland, and rural areas are looking down the road when they will be developing, and their water is already spoken for.

N.Y. Times, July 7, 1982, at A17, col. 1.

133. Civ. No. 80-730-HB (D.N.M. Jan. 17, 1983).

134. The New Mexico embargo statute is as follows:

Removal of underground waters from state—

No person shall withdraw water from any underground source in New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of New Mexico and pumping water from under lands lying within the boundaries of New Mexico; provided that nothing in this act [72-12-18 to 72-12-21 NMSA 1978] prohibits the transportation of water by tank truck from any underground source in New Mexico to any other state where the water is used for exploration and drilling for oil or gas. The owner of the well from which the water is withdrawn shall have a duty to ascertain that the water exported is used only for the above purposes and such owner shall keep and maintain accurate records of the amount of water withdrawn and make such records available to the state engineer of New Mexico upon request. The amount of water withdrawn from any one well for such exportation shall never exceed three acre-feet.

N.M. STAT. ANN. § 72-12-19 (1978).

lacked “evenhandedness,” i.e., a balance between *intrastate* and *interstate* regulation as required under the present-day *Pike* analysis, (3) that New Mexico allocated its water resources *intrastate* for all uses, including so-called low priority uses, while simultaneously depriving out-of-state users with the highest priority — economic and human survival, and (4) that New Mexico’s “absolute” restrictions were a more obvious violation of the Constitution than Nebraska’s “discretionary” restrictions discussed in *Sporhase*.¹³⁵

One of the major questions to be pondered in these cases is whether the state’s objectives in attempting to prevent exacerbated water shortages could be realized through alternative methods, thereby avoiding the alleged impact on interstate commercial activities. El Paso suggested some possible alternatives to New Mexico’s statutory scheme: changes in the pattern of uses, improvements in irrigation efficiency, desalinization projects, and importation of water, to name a few. Furthermore, the focus ought to be when and where the water may be put to its highest and most beneficial use.¹³⁶ In the *El Paso* case, as well as in *Sporhase*, the time is now and the place is across state lines for the highest and best use of water. Rather than accept New Mexico’s general assertion that it needs to guard its water preserves to offset future water shortages, El Paso responded: “To say that at some time in the indefinite future there will be a shortage and that this justifies the embargo is simply another way of saying that the state should be free to restrict all water to use in-state, forever.”¹³⁷

The New Mexico absolute water embargo statute was struck down as unconstitutional under the Commerce Clause:

The purpose of the embargo is to promote New Mexico’s economic advantage. Even if the purpose were conservation and preservation, as [New Mexico] maintain[s], the embargo does not significantly advance the conservation and preservation of water. It certainly is not narrowly tailored to achieve that purpose and cannot survive strict scrutiny.¹³⁸

135. See Plaintiffs’ Supplemental Post-Trial Brief, *City of El Paso v. Reynolds*, Civ. No. 80-730-HB (D.N.M. Jan. 17, 1983).

136. *Id.* at 21-24.

137. *Id.* at 27.

138. *City of El Paso v. Reynolds*, Civ. No. 80-730-HB, slip op. at 36 (D.N.M.

New Mexico's intrastate water laws sustained a policy of "maximum beneficial use [which meant] putting as much water to beneficial use as soon as possible."¹³⁹ The court noted that El Paso is the "economic hub of an interstate region which includes southern New Mexico [and consequently,] the most beneficial and economically productive use of [New Mexico's ground water] is in El Paso for the simple reason that what is good for El Paso is good for the entire region, including southern New Mexico."¹⁴⁰

The recent movement by the Great Lakes States to control any diversion of water from the lakes of that region has been manifested in a resolution¹⁴¹ forwarded to The White House. At first glance the reso-

Jan. 17, 1983).

139. *Id.* at 33.

140. *Id.* at 34.

141. Mackinac Resolution (prepared at Great Lakes Water Resources Conference, June 9-11, 1982). From June 9-11, 1982, the 1982 Great Lakes Water Resources Conference was held at Mackinac Island, Michigan. The participant "Great Lakes States" included Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, Wisconsin, and the Canadian Provinces of Ontario and Quebec. The resolution regarding water "diversions" is reprinted here in its entirety. It includes an objection to any future diversion of Great Lakes water to alleviate the strains of fresh water shortages that "already are apparent and are expected to reach major proportions in the next decade . . ." in other parts of the United States. The resolution recognizes "substantial increases in consumptive uses within the Basin over the next half century to meet *our own* growing needs . . ." The proposal notes the economic interest of the participants and calls for the "concurrence" of the Great Lakes States, the United States Federal Government, and the Federal Government of Canada and the provinces contiguous to the Great Lakes system. *Id.* (emphasis added).

MACKINAC RESOLUTION

DIVERSIONS

WHEREAS, the States and Provinces in the Great Lakes Basin have been blessed with an incomparable water resource; and

WHEREAS, increasing evidence points to severe freshwater shortages in other parts of the United States, shortages that already are apparent and are expected to reach major proportions in the next decade; and

WHEREAS, the search already has begun for alternative sources of water for those regions, with support for some of that search coming from the United States Federal Government; and

WHEREAS, the water of the Great Lakes is needed to meet the current and future domestic, industrial, navigational, power, agricultural and recreational needs of the Great Lakes and St. Lawrence region;

WHEREAS, the findings of the International Joint Commission's Great

lution appears reasonable, because the Great Lakes States speak of

-
- Lakes Diversions and Consumptive Uses Study Board indicates that we will be faced with substantial increases in consumptive uses within the Basin over the next half century to meet our own growing needs; and
- WHEREAS, the diversion of water from the Great Lakes Basin to other water basins reduces the net supply of water available to the Great Lakes Basin and lowers lake levels; and
- WHEREAS, lowered lake levels and reduction of flows in connecting channels could result in serious losses in water supply, navigation and recreational values causing critical economic, social and environmental problems adverse to the people of the Great Lakes and St. Lawrence States and Provinces; and
- WHEREAS, the wise use and development of the water resources of the Great Lakes is essential to the economy and prosperity of the Great Lakes and St. Lawrence States and Provinces; and
- WHEREAS, the diversion of Great Lakes waters to other regions of the United States or Canada could result in severe restrictions in the growth and development of the Great Lakes and St. Lawrence region; and
- WHEREAS, it makes far more sense for development to occur where abundant supplies of fresh water already exist, rather than moving the water to other regions; and
- WHEREAS, we share in the responsibility for the stewardship of the tremendous natural resources which the Great Lakes provide;
- WHEREAS, the Boundary Waters Agreement of 1909 requires that any change in the flows and levels of any boundary waters is subject to approval by the federal governments of both the United States and Canada.
- NOW THEREFORE BE IT RESOLVED by the Great Lakes States and Provinces that based on existing information they object to any new diversion of Great Lakes water for use outside the Great Lakes States and Provinces; and
- BE IT FURTHER RESOLVED that no future diversions be considered until a thorough assessment, involving all jurisdictions contiguous to the Great Lakes System, of the impacts on navigation, power generation environment and socio-economic development for all said jurisdictions takes place.
- BE IT FURTHER RESOLVED that any future decision on the diversion of Great Lakes water for use outside of the Great Lakes States and Provinces be made only with the concurrence of the Great Lakes States, the United States Federal Government, and the Federal Government of Canada and the Provinces contiguous to the Great Lakes system.

“shar[ing] in the responsibility for the stewardship of the tremendous natural resources which the Great Lakes provide . . . ,”¹⁴² and of a “concurrence” among the Great Lakes States, the United States Federal Government, and the Canadian Government. But the motives accompanying these written words align themselves with the “protection-

The Canadian Government and its provinces are included, as well as the United States Federal Government, because of an international treaty between the United States and Canada regarding the Great Lakes. *See* Boundary Water Treaty, Jan. 11, 1909, United States-Great Britain, 36 Stat. 2448, T.S. No. 548, and Great Lakes Water Quality Agreement, Nov. 22, 1978, United States-Canada 30 U.S.T. 1383, T.I.A.S. No. 9257.

Apparently, the participants at the Great Lakes Water Resources Conference intended to follow through on their commitments made at the Conference. Former Michigan Governor William Milliken is now the chairman of the board of the Center for the Great Lakes which was recently established in Chicago, Illinois. The Center, says Milliken, wants to help those involved with plans for the future of the Great Lakes, particularly water diversion from the lakes, to “make their decisions on an informed basis.” 69 A.B.A. J. 152 (1983).

See also H.R. 5278 proposed bill, which, if it had passed, would have prohibited the interstate transfer or sale of water by any state part of an interstate water system unless there was prior agreement among all the states affected. Introduced by Representative Berkley Bedell (D-Iowa), H.R. 5278 read as follows:

A BILL

To prohibit any State from selling or otherwise transferring interstate waters located in such State for use outside such State unless all other States in the drainage basin of such waters consent to such sale or transfer.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no State shall sell or otherwise transfer, for use outside of such State, water which is taken from any river or other body of surface which is located in or which passes through more than one State or any aquifer or other body of ground water which underlies more than one State unless—

(1) there is in effect an interstate compact (A) between the States in the drainage basin of such river or other body of surface water, or (B) between the affected States, in the case of such an aquifer or other body of ground water, which governs such sale or transfer, and

(2) all the States which are parties to such compact consent to such sale or transfer.

H.R. 5278, 97th Cong., 1st Sess. (1981).

142. Mackinac Resolution *supra* note 141.

ist" camp.¹⁴³ It is precisely this type of proposed "constituent legislation" which feeds the controversy, promotes self-regard, and offers little toward easing the tension between those who have and those who do not have.

In addition to current litigation and policy concerns on the subject of interstate transfer of water, it is important to note The National Water Commission's Report to the President.¹⁴⁴ Its report, upon the termination of its study of the nation's water policies in 1973, suggested that Congress and the States look at various factors when approaching the issue of interstate transfer of water necessary to satisfy the justified needs of those deprived. Among the considerations mentioned were local, regional, and national economic development, the need to put water to its highest and best use, federal aid, environmental concerns, and an equitable compensation system for the exporting state.¹⁴⁵ Unfortunately, balancing these concerns remains a difficult task.

Conclusion

The *Sporhase*¹⁴⁶ case has not entirely settled the issue of interstate transfer of ground water. The United States Supreme Court, under the *Pike*¹⁴⁷ test, has sustained the constitutionality of the first three conditions of section 46-613.01 of the Revised Statutes of Nebraska¹⁴⁸ —

143. As staff aide to former Michigan Governor William Milliken, William Rustem explained the region's position:

We fully anticipate that one of the Western States will challenge our contention that the Great Lakes belong to the states that surround them and are not a national resource that can be tapped into by any state.

. . . Due to the population shift to the West and Southwest, the political power in Congress is shifting When these areas really start hurting for water, the obvious political solution will be to pipe more water. We want to be ready for that.

Quade, *Water Wars Predicted in a Thirsty Nation*, 68 A.B.A. J. 1067 (1982).

144. NATIONAL WATER COMMISSION REPORT TO THE PRESIDENT, WATER POLICIES FOR THE FUTURE (1973).

145. *Id.* at 317-33.

146. *Sporhase v. Nebraska*, 102 S. Ct. 3456 (1982).

147. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). For text of the *Pike* test, see *supra* text accompanying note 104.

148. NEB. REV. STAT. § 46-613.01 (1978). See *supra* text accompanying note

i.e., that the requested withdrawal of ground water be reasonable, not contrary to Nebraska's conservation aims, and not detrimental to the public welfare. Joy Sporhase and Delmer Moss must still, therefore, apply for a permit from Nebraska's Director of Water Resources before withdrawing ground water from their well, for irrigation of their Nebraska and Colorado land. In effect, the permit will be issued at the discretion of the Director of Water Resources dependent upon *his* evaluation of the request guided by the statutory conditions. Consequently, Sporhase and Moss could conceivably be denied the permit, thus prohibited from withdrawing quantities of ground water for their irrigation needs.¹⁴⁹

All water embargo statutes classified as either absolute embargoes or as embargoes triggered by the reciprocity requirement,¹⁵⁰ should be eliminated as facially discriminatory legislation, and therefore unconstitutional. The discretionary water embargo statutes, similar to the Nebraska statute in *Sporhase* without the reciprocity provision, should be scrutinized under the force of the *Pike* Commerce Clause balancing test which was employed in *Sporhase*.¹⁵¹ Although the *Pike* test focused on the effect of state legislation on interstate commerce balanced by "evenhanded" intrastate regulation, it is mandatory to recognize and incorporate into the balancing formula the individual, economic, and survival interests at stake.

The Supreme court in *Sporhase* declared water an article of commerce thereby triggering Commerce Clause analysis. However, water must also be appreciated and dealt with as an essential natural resource, and as such, "constituent legislation" which hinders its reasona-

108 for statute in its entirety.

149. See *Sporhase*, 102 S. Ct. at 3469 n.3 (Rehnquist, J., dissenting). For this very reason, all discretionary water embargo statutes must provide an appellate procedure for those denied a permit.

150. For examples of the various water embargo statutes, see ARIZ. REV. STAT. ANN. § 45-153 (Supp. 1982-83); CAL. WATER CODE § 1230 (Deering 1977); COLO. REV. STAT. §§ 101-103 (Supp. 1982); IDAHO CODE §§ 401-410 (1977); KAN. STAT. ANN. § 82a-726 (1977); MONT. CODE ANN. § 85-1-121 (1981); NEV. REV. STAT. §§ 533.515-533.524 (1979); N.J. STAT. ANN. § 58:1A-5 (1982); N.M. STAT. ANN. §§ 72-12-18, 72-12-19 (1978); OR. REV. STAT. § 537.810 (1977); UTAH CODE ANN. § 73-2-8 (1981); WASH. REV. CODE ANN. §§ 90.03.300, 90.16.110, 90.16.120 (1962); WYO. STAT. § 41-3-115 (1977).

151. See *supra* text accompanying notes 117-22.

ble use should be eliminated. There exists a fear that without water "embargo" statutes, unchecked withdrawal and subsequent transfer of ground water out-of-state will lead to an uncontrolled and rapid depletion of water reserves. In the most recent statement on this issue, the court in *City of El Paso v. Reynolds*¹⁵² mollified this fear: "The absence of an embargo statute will not create havoc in New Mexico's system of ground water regulation. It will not result in unrestricted out-of-state use or uncontrolled transfers of water. Interstate usage of water can be restricted and controlled to the same extent as intrastate usage."¹⁵³

Water, as both a natural resource and an article of commerce, is needed for life. It is needed by individuals to pursue their livelihood. "[A] State's interest in its resources must yield when . . . it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right protected by the Privileges and Immunities Clause of the Constitution."¹⁵⁴ Water is needed by communities throughout the nation to foster and sustain economic growth. The *Sporhase* balancing approach is clearly a step toward mitigating the controversy. Beyond *Sporhase* and the declaration that absolute and reciprocal water embargo statutes are unconstitutional, however, interstate compacts¹⁵⁵ to govern in the area of interstate ground water transfer between states may become necessary. These agreements will be especially applicable, for example, to those states which overlie an interstate aquifer.¹⁵⁶ Until sporadic water shortages, surface water pollution, acid rain, and conservation of water resources can be effectively managed, fresh ground water reserves will continue to be tapped as an alternative

152. Civ. No. 80-730-HB (D.N.M. Jan. 17, 1983).

153. *Id.* slip op. at 31 (emphasis added).

154. *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 386 (1978).

155. *See supra* note 5 for a discussion of interstate compacts.

156. The Ogallala aquifer, from which *Sporhase* and *Moss* were withdrawing ground water, has a "multistate character" and underlies land in parts of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, and Texas. *See Sporhase*, 102 S. Ct. at 3463 (1982) (footnote omitted). It would seem that those states which overlie the same aquifer or ground water depository would desire the opportunity to design an interstate compact to govern ground water withdrawal among those states. Six independent ground water withdrawal policies and prohibitions, particularly in the case of the Ogallala aquifer which underlies six states, accomplishes little toward achieving equitably balanced withdrawals.

source of water supply.

This note recommends the employment of interstate compacts to govern in the area of interstate ground water transfer, similar to the compacts initiated in the area of surface water diversions.¹⁵⁷ Moreover, the surface water interstate compacts which currently contain dormant ground water transfer provisions,¹⁵⁸ ought to be reviewed, amended, and activated to avoid future conflict. The interstate compact is one step shy of promoting a uniform federal water policy which would specifically administer the interstate transfer of ground water. Although a national policy may seem feasible in order to terminate fifty independent state policies which may not be in harmony with the national welfare, the interstate compact enables the states to retain authority and control in their area of expertise — local water management. The interstate compact incorporates the federal component with the participation of a federal representative in the negotiation process between states.¹⁵⁹ Furthermore, Congressional consenting legislation, with or without modification, is generally required under the United States Constitution.¹⁶⁰ A uniform national policy presents the problem of the extent to which the federal government would carve out the law and place itself in the area of interstate water transfer, thereby impinging on the traditional deference to state and local water management.¹⁶¹ Moreover, a federal policy would need to accommodate the various regional interests and factors including the disparity in geography, climate, and consumptive use.¹⁶²

The fact that two farmers were threatened with a shutdown of their irrigation system because they were withdrawing ground water from a neighboring state, is a signal to reevaluate the nation's water laws and promote the sharing of our natural resources. This note illus-

157. See discussion *supra* note 5.

158. See, e.g., Susquehanna River Basin Compact, Pub. L. No. 91-575, 84 Stat. 1509, § 11.1 at 1523 (1970). This note does not assert that this particular compact's ground water provision is dormant. Rather, citation is made as an example of a ground water provision in an interstate compact.

159. See discussion *supra* note 5.

160. See discussion *supra* note 5.

161. See *Sporhase*, 102 S. Ct. at 3465-66.

162. See generally *Sporhase*, 102 S. Ct. at 3462 n.13 (1982)(citing *California v. United States*, 438 U.S. 645, 648 (1978)).

trates precisely the type of “warring” between the states that the Commerce Clause and the Constitution sought to prevent:

In [interstate commerce], instead of the states, a new power appears and a new welfare, a welfare which transcends that of any State [L]et us say it is constituted of the welfare of all of the States, and that of each State is made greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States.¹⁶³

As Justice Cardozo has said, the Constitution “was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”¹⁶⁴

Gary S. Betensky

163. *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911).

164. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

The Products Liability Statute of Repose in Florida: A Trap for the Unwary

Introduction

In the past two decades there has been an explosion of product liability lawsuits¹ brought against manufacturers of defective goods²

1. The number of products liability lawsuits being filed in district courts increased 134% between 1974 and 1976 (from 1,579 to 3,696). UNITED STATES DEPARTMENT OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT, 11-44 (1977) [hereinafter cited as FINAL REPORT], cited in Donnelly, *Date-of-Sale Statutes of Limitation: An Effective Means of Implementing Change in Products Liability Law?*, 30 CASE W. RES. 123, 123 n.1 (1979).

In April of 1976, the economic Policy Board of the White House established the Interagency Task Force to investigate widespread claims by the manufacturing industry that products liability insurance had become so unavailable or unaffordable that the situation had reached "crisis" proportions. 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 4B at 1-64, -65 (1980). In January, 1977, the Task Force published a Briefing Report which concluded that there was no crisis. *Id.* at 1-65. The Task Force published its Final Report on November 1, 1977. *Id.* at 1-65. Three main reasons were cited as the main causes of higher products liability insurance rates: "[1] the ratemaking procedures of insurers, [2] the production of unsafe products, and [3] uncertainties as to how [products liability law] is developing." *Id.* at 1-65.

2. A "product liability claim" includes:

any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, or instructions, marketing, packaging, storage, or labelling of the relevant product. It includes, but is not limited to, any action previously based on: strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment or nondisclosure, whether negligent or innocent; or under any other substantive legal theory.

MODEL UNIFORM PRODUCT LIABILITY ACT § 102(D), reprinted in 44 Fed. Reg. 62,714, 62,717 (1979) [hereinafter cited as MODEL ACT]. For a summary of the repose period proposed by the MODEL ACT, see *infra* note 18. The function of product liability law "is to shift the cost of an accident from a claimant to a defendant when the latter is deemed 'responsible' for the claimant's injuries." MODEL ACT, 44 Fed. Reg. at 62,715 (1979).

due to increased manufacturers' exposure to liability.³ This phenomenon, referred to as the "product liability revolution,"⁴ has expanded manufacturers' liability and facilitated recovery for injured plaintiffs for product-caused injuries.

The manufacturing industry has responded with attempts to limit their liability resulting in legislative enactment of statutes of repose. Statutes of repose are limitations of actions which eliminate the manufacturer's liability after a specified time from manufacture or sale of the product, rather than from the date of discovery of the defect. This

3. The Florida Supreme Court recently adopted the doctrine of strict liability as stated by the American Law Institute in its *RESTATEMENT (SECOND) OF TORTS* § 402A. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976). For the text of § 402A, see *infra* note 8.

Others besides manufacturers have been adversely affected by recent developments in products liability law. Even non-negligent wholesalers, distributors and retailers of a defective product can be held strictly liable for injuries caused by a defective product. *West*, 336 So. 2d 80; *Adobe Bldg. Centers, Inc. v. Reynolds*, 403 So. 2d 1033 (Fla. 4th Dist. Ct. App. 1981). See also *Futch v. Ryder Truck Rental, Inc.*, 391 So. 2d 808 (Fla. 5th Dist. Ct. App. 1980) (where the court held that a lessor of a defective truck could be held strictly liable for resulting injuries caused by the defect). This so-called "technical" or "constructive" liability constitutes a cause of action for common law indemnity in the amount of any damages, reasonable attorney's fees, costs and expenses against the manufacturer for breach of its contractual duty to supply the wholesaler, distributor or retailer with a product reasonably safe for its intended purposes. *Insurance Co. of North America v. King*, 340 So. 2d 1175 (Fla. 4th Dist. Ct. App. 1976). See also *Pender v. Skillcraft Indus., Inc.*, 358 So. 2d 45 (Fla. 4th Dist. Ct. App. 1978) (retailers, and presumably wholesalers and distributors, are likewise entitled to indemnity for attorney's fees and costs when they have merely been passively negligent and successfully defend themselves in the main action); *Burbage v. Boiler Eng'g & Supply Co.*, 249 A.2d 563 (Pa. 1969) (where manufacturer strictly liable for defective replacement component part was found to be entitled to indemnity from component part manufacturer). There will be a different result if the party claiming the indemnity is himself negligent or is vicariously responsible for the negligence of another person which contributed to causing the injuries. *Dura Corp. v. Wallace*, 297 So. 2d 619 (Fla. 3d Dist. Ct. App. 1974); *Winn-Dixie Stores, Inc. v. Fellows*, 153 So. 2d 45 (Fla. 1st Dist. Ct. App. 1963); see also *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490 (Fla. 1979) ("[i]ndemnity can only be applied where the liability of the person seeking indemnity is solely constructive or derivative and only against one who, because of his act, has caused such constructive liability to be imposed"). Since the liability issue under discussion is most acute for manufacturers, reference will generally be made to them.

4. Martin, *A Statute of Repose For Product Liability Claims*, 50 *FORDHAM L. REV.* 745, 745 (1982).

note will consider the provisions, function and practical application of this type of legislation, and explore the ramifications associated with their implementation.

Evolution of the Products Liability Statute of Repose

Due to the dramatic increase in products liability litigation in recent years, manufacturer's liability for products released into the stream of commerce has been expanded on several distinct fronts. First, the number of persons who may sue has increased because the privity requirement has been relaxed for causes of action not sounding in negligence.⁵ Florida courts can now recognize liability of a manufacturer who sells a product in a defective condition which is deemed unreasonably dangerous to the user, consumer or innocent bystander.⁶ In 1931, Judge Cardozo sounded the alarm that "[t]he assault upon the citadel of privity"⁷ was proceeding apace.

Second, the creation of strict liability⁸ and the creative application of the various warranty theories complementing the traditional com-

5. *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1956). Prior to this decision, Florida recognized the early common law rule which inhibited recovery where there was no privity of contract. *Id.* at 300-01.

6. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

7. *Ultramares Corporation v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931). See also Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966) [hereinafter cited as Prosser, *The Fall*]; Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960) [hereinafter cited as Prosser, *The Assault*].

8. W. PROSSER, RESTATEMENT (SECOND) OF TORTS, § 402A (1965) states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

mon law negligence theories⁹ have greatly increased the likelihood of recovery by victims of defective products.¹⁰ Astute plaintiffs' attorneys commonly plead negligence, breach of implied warranty and strict liability theories alternatively, and overcome previously insurmountable hurdles to recovery through the use of variations inherent in each of these theories. The once-popular doctrine of caveat emptor seems to have little utility in the present age of highly sophisticated products, when consumers are forced to rely upon the specialized knowledge and competence of manufacturers.¹¹

In addition, there has been a flood of products liability lawsuits in recent years following each revelation of another toxic man-made product, which was not previously suspected of having a toxic tendency.¹² Typically, the injury or affliction caused by exposure to this type of defective product remains latent for many years. The effects of the defective product during this dormant period often lack discernible symptoms, even to the medical profession.¹³ The peculiarities associated with

9. In *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307 (Fla. 3d Dist. Ct. App. 1968), the court acknowledged the existence of 29 separate recovery theories related to products liability. *Id.* at 309 (citing Prosser, *The Assault* at 1124 (1960)).

10. This is especially true under a theory of strict liability, which has a lesser burden of proof than negligence or warranty theories. *See generally*, Parks, Watts-FitzGerald, & Watts-FitzGerald, *Products Liability*, 33 U. MIAMI L. REV. 1185 (1979).

11. For a general discussion, see Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855 (1963).

12. For example, the quantity of asbestosis, Dalcon Shield (birth control device) and synthetic estrogen drug diethylstilbestrol (commonly known as DES) products liability lawsuits is staggering. It is estimated that in February, 1980 there were more than 3,000 asbestosis cases pending nationally and over 500,000 more individuals "at risk." Practicing Law Institute seminar in New York City on Toxic Substances Litigation, reported in 8 *Prod. Safety & Liab. Rep. (BNA)* 142 (1980). In a class action consolidating 1,500 Dalcon Shield cases, a United States District Court noted that compensatory damages claimed in the action were "well over \$500 million and punitive damages, which combined, far exceeded the net worth of the IUD manufacturer." *In re "Dalcon Shield" I.U.D. Products Liability Litigation* (N.D. Cal. June 25, 1981), reported in 9 *Prod. Safety & Liab. Rep. (BNA)* 570, 570 (1981). Lastly, it was estimated in July, 1980, that there were approximately 1,000 lawsuits pending against DES manufacturers for cancerous vaginal abnormalities found in the daughters of the mothers who ingested this prescription drug to prevent miscarriages between 1947 and 1971. Rodgers, *DES Ruling Shakes Products Liability Field*, 66 A.B.A. J. 827 (1980).

13. This is probably best illustrated in the DES cases, where prenatally exposed

products with latent defects present many problems with the application of statutes of limitations for bringing such actions. Most notably is the often long time-lag between exposure to the defective product and discovery of the defect. Hence, the duration of the manufacturer's responsibility to answer for product-related injuries has increased because persons more remote in the privity chain—and even persons outside of it—are permitted to sue many years after the delivery of the defective product.

As a result of the manufacturer's increased exposure to liability for defective products,¹⁴ insurers impose corresponding increases in premiums for product liability insurance.¹⁵ Manufacturers view this increase as the result of more frequent product liability litigation and higher damage awards.¹⁶ Consequently, the manufacturing industry nationwide wages a vigorous lobbying campaign to convince legislators and consumers that there is a need to "reform" current product liability laws. Their goal is to reduce the costs associated with insurance coverage and products liability litigation.¹⁷

Possibly the most notable result of the manufacturing industry's efforts is the enactment of repose legislation by a number of states,¹⁸

daughters of mothers who took the drug often do not develop abnormal symptoms until sometime after puberty. Researchers are trying to establish whether sons of mothers who ingested DES were having infertility problems as late as 1980. The lack of empirical data may delay such a revelation another ten years or longer. For a well-researched reference to products with latent defects, especially in the medical field, see Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad*, 16 U. RICH. L. REV. 323 (1982).

14. See *Auburn Machine Works Co. v. Jones*, 366 So. 2d 1167 (Fla. 1979), where the Florida Supreme Court rejected the "patent danger" or "open and obvious hazard" doctrine and held:

the obviousness of the hazard is not an exception to liability on the part of the manufacturer but rather is a defense by which the manufacturer may show that the plaintiff did not exercise a reasonable degree of care as required by the circumstances. We also conclude that the principles of comparative negligence apply where this defense is raised.

Id. at 1167.

15. FINAL REPORT, cited in Donnelly, *supra* note 1, at 124.

16. Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 663 (1978).

17. FINAL REPORT, cited in Donnelly, *supra* note 1, at 125 n.7.

18. ALA. CODE § 6-5-502(c) (Supp. 1982) ("within 10 years after the manufac-

including Florida,¹⁹ terminating a manufacturer's responsibility after a specified time elapses after delivery of the product to its original pur-

chased product is first put to use"); ARIZ. REV. STAT. ANN. § 12-551 (1982) ("twelve years after the product was first sold"); COLO. REV. STAT. ANN. § 13-21-403(3) (Supp. 1982) ("[t]en years after a product is first sold . . . it shall be rebuttably presumed that the product was not defective"); CONN. GEN. STAT. ANN. § 52-577a(a) (West Supp. 1982) ("ten years from the date that such party last parted with possession or control of the product"); GA. CODE ANN. § 105-106(b)(2) (Supp. 1982) ("10 years from the date of the first sale"); IDAHO CODE § 6-1403 (Michie Supp. 1982) ("ten (10) years after time of delivery, a presumption arises that . . . the useful safe life had expired"); ILL. ANN. STAT. ch. 83, § 22.2(b) (Smith-Hurd Supp. 1982-1983) ("12 years from the date of first sale, lease or delivery . . . by a seller or 10 years from the date of first sale, lease or delivery to its initial user"); IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1982) ("ten (10) years after the delivery of the product"); 4A KAN. STAT. ANN. § 60-513(b) (1976) ("ten (10) years beyond the time of the act giving rise to the cause of action"); KY. REV. STAT. ANN. § 411.310(1) (Michie Supp. 1982) (non-defective presumption arises "five (5) years after the date of sale . . . or more than eight (8) years after the date of manufacture"); MICH. COMP. LAWS ANN. § 600.5805(9) (West Supp. 1982-1983) (after ten years, plaintiff must prove his prima facie case without the benefit of any presumptions); MINN. STAT. ANN. § 604.03 (West Supp. 1983) ("expiration of the ordinary useful life of the product"); NEB. REV. STAT. § 25-224(2) (Cum. Supp. 1982) ("ten years after the date when the product . . . was first sold or leased"); N.H. REV. STAT. ANN. § 507-D:2(II) (Supp. 1979) ("12 years after the manufacturer . . . parted with its possession and control or sold it, whichever occurred last"); N.C. GEN. STAT. § 1-50(6) (Supp. 1981) ("six years after the date of initial purchase"); N.D. CENT. CODE § 28-01.1-02 (Supp. 1981) ("ten years of the date of initial purchase . . . or within eleven years of the date of manufacture"); OR. REV. STAT. § 30.905(1) (1979) ("eight years after the date on which the product was first purchased"); R.I. GEN. LAWS § 9-1-13(b) (Michie Supp. 1982) ("ten (10) years after the date the product was first purchased"); S.D. CODIFIED LAWS ANN. § 15-2-12.1 (Supp. 1982) ("six years after the date of delivery"); TENN. CODE ANN. § 29-28-103 (1980) ("ten years from the date on which the product was first purchased . . . or within one (1) year after the expiration of the anticipated life . . . , whichever is shorter"); UTAH CODE ANN. § 78-15-3 (1977) ("six years after the date of initial purchase . . . or ten years after the date of manufacture"); WASH. REV. CODE ANN. § 7.72.060 (Supp. 1983-84) ("after the product's 'useful safe life' had expired," which is presumed to be "twelve years after the time of delivery"); *see also* MODEL ACT, *supra* note 2, 44 Fed. Reg. at 62,732 (where a uniform repose period ending at the expiration of a product's "useful safe life" is proposed, and a rebuttable presumption arises ten years after delivery that the product's useful safe life had expired).

19. FLA. STAT. § 95.031(2) (1981) ("within 12 years after the date of delivery"). As of January, 1982, twenty-two states had adopted "statutes of repose", or statutes of limitations which operate from the act or omission complained of, therefore serving as

chaser. This type of statute is commonly known as a "statute of repose".

A statute of repose is distinguishable from a statute of limitation, which "ordinarily begins to run when there has been a breach of an obligation."²⁰ A statute of limitation serves to place a time limit on the plaintiff's right to bring an action for recovery of a loss caused by a breach.²¹ On the other hand, a statute of repose limits the duration that the manufacturer's obligation remains outstanding, and, therefore, the obligation owed by the manufacturer "exists only during the statutory period."²² Thus, injuries which occur after the running of the statute of repose cannot, theoretically, be the subject of successful lawsuits, since the manufacturer's obligation to pay for the injury has since expired.

The practical difference between these two distinct types of limitations lies in the fact that the statute of limitation implicitly seeks to punish those plaintiffs who "sleep on their rights," while the statute of repose operates to bar some plaintiffs' actions no matter how diligent they have been in asserting their claims.²³ It appears necessary, therefore, to analyze the reasoning supporting a statute of repose which could limit or extinguish the rights of even the most prudent and diligent plaintiffs.

The usefulness and practical need for a statute of repose is difficult to discern. Through recent developments in products liability litigation and the "products liability revolution," manufacturers were suddenly faced with the possibility of perpetual liability for defects in the products they produced many years before. As one commentator put it, the public "which has been persuaded to buy with enthusiasm is just as eager to impose liability if the product [causes] harm."²⁴ In response, manufacturers argue that statutes of repose protect both the courts and the defendants against the possibility of litigating claims from old product-caused injuries, which necessitate proof by stale or often un-

statutes of repose. Martin, *A Statute of Repose for Product Liability Claims*, 50 *FORDHAM L. REV.* 745, 749 n.25 (1982).

20. See Martin, *supra* note 19, at 749.

21. *Id.*

22. *Id.*

23. See Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 *CATH. U. L. REV.* 361, 377-79 (1969).

24. 1 L. FRUMER & M. FRIEDMAN, *supra* note 1, § 1 at 1-6 (1980).

available evidence.

The expense of litigating older claims is more costly, even when the defendant-manufacturer prevails.²⁵ Often, records and witnesses are difficult to obtain. Manufacturers contend that this cost increase is ultimately born by consumers, through higher prices. Indeed, the policy reasons supporting repose and avoiding stale claims are strong. Manufacturers also argue that there is a greater likelihood that older products have been misused or subjected to modification. In addition, there is also a real chance that the jury might wrongly evaluate a product's "defective" nature by unwittingly comparing today's standards, rather than the state of the art existing in the industry at the time of manufacture.²⁶

Statutes of repose also provide the manufacturer with a reasonable standard from which they can predict potential liability. Thus, a manufacturer may plan for future tort liability, or at least designate certain funds to cover the cost of product liability insurance premiums which theoretically will be lower due to decreased exposure to liability.²⁷ However, all of the factors supporting statutes of repose tend to prejudice defendants with the passage of time.

Application of the "Ultimate Repose" in Florida

Sensing a need for reform—the probable consequence of the various manufacturing industry lobbying efforts—beginning in 1974, the Florida Legislature extensively amended chapter 95 of the Florida

25. The cost of investigating and processing claims is obviously greater when records and witnesses take longer to assemble, such as in proving or defending allegations that an old product is defective.

26. See MODEL ACT, *supra* note 2, 44 Fed. Reg. at 62,734; Comment, *Statutes of Repose in Products Liability: The Assault Upon the Citadel of Strict Liability*, 23 S.D.L. REV. 149, 171 (1978).

27. There is at least one recent decision which indicates that empirical data has shown that statutes of repose cut down consumer's remedies without reducing insurance costs or increasing the availability of products liability insurance for business. See *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982). "To say that barring claims involving products that have been used for more than 10 years will eradicate and ease the cost increases in consumer prices and product liability insurance is unreasonable in our opinion." *Id.* at 1001; see also 25 ATLA L. REP. at 295 (Sept. 1982).

Statutes, which governs the time limitations for bringing suit.²⁸ In pertinent part, section 95.11 now provides:

[a]ctions other than for recovery for real property shall be commenced as follows:

. . .

(3) Within four years.—

(a) An action founded on negligence.

. . .

(e) An action for injury to a person founded on the design, manufacture, distribution, or sale of personal property that is not permanently incorporated in an improvement to real property, including all fixtures. . . .²⁹

Further, section 95 of the Florida Statutes mandates that actions for products liability brought under section 95.11(3):

must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in subsection (3) of s. 95.11, *but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . .*, regardless of the date the defect in the product . . . was or should have been discovered.³⁰

Therefore, the Florida Legislature chose to supplement the traditional “4 year from the date of injury” limitation by tacking on a maximum specified time within which products liability actions must be brought—a “12 year from the date of delivery” limitation. Statutes of repose for products liability actions, such as this one in Florida, have thus far been adopted in twenty-three jurisdictions.³¹

28. 1975 Fla. Laws 74-382. These revisions became effective on January 1, 1975.

29. FLA. STAT. § 95.11(3)(a), (e) (1981).

30. FLA. STAT. § 95.031(2) (1981) (emphasis added).

31. For a list of these “date of sale” or “date of delivery” statute of limitation jurisdictions, see *supra* notes 18-19. In early 1980, the 22 states that had enacted product liability statutes of repose at that time provided the law for 34% of personal injury and 38% of property damage claims in the product liability area. See, Martin, *supra* note 19, at 759 n.80.

Traditionally, statutes of limitations employed in tort actions do not begin running until the injury itself is sustained.³² Section 95.031 of the Florida Statutes states that “[e]xcept as provided in subsection (2) . . . , the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.”³³ Recent developments in the area of products liability, however, have generated a “discovery rule,” wherein the statutory period begins running “from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence. . . .”³⁴

Viewing the applicable Florida Statutes together, a person injured by a defective product in Florida could bring an action against the manufacturer within four years from the date they discovered (or should have discovered) that the cause of their injury was the defective product.³⁵ This statutory period of four years would not, therefore, necessarily begin running at the date of injury if discovery of the defect was not until a later date. If the action involves a product with a latent defect, the four year period “runs from the date the defect is discovered or should have been discovered.”³⁶ However, the statute of repose states that no action would be permitted which was filed after 12 years from

32. Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1178, 1185 (1949).

33. FLA. STAT. § 95.031 (1981).

34. FLA. STAT. § 95.031(2) (1981). A statute of limitations begins to run “when there has been notice of an invasion of the legal right of the plaintiff” or when a person has first “been put on notice of his right to a cause of action.” *City of Miami v. Brooks*, 70 So. 2d 306, 309 (Fla. 1954). See also *Nardone v. Reynolds*, 508 F.2d 660 (5th Cir. 1975); *Creviston v. General Motors Corp.*, 225 So. 2d 331 (Fla. 1969); *Lund v. Cook*, 354 So. 2d 940 (Fla. 1st Dist. Ct. App. 1978); *Buck v. Mouradian*, 100 So. 2d 70 (Fla. 3d Dist. Ct. App. 1958). For the most part, the time at which a plaintiff’s cause of action accrues is deemed to be the time at which the injury was sustained.

35. FLA. STAT. §§ 95.031 (1981) and 95.11(3) (1981).

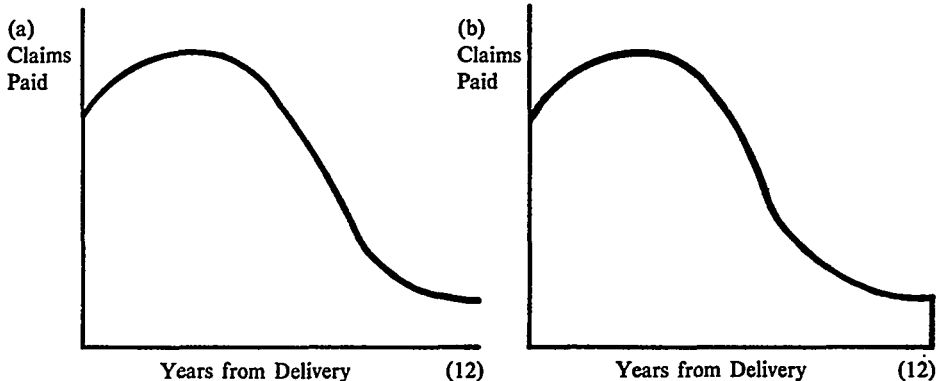
36. *Bauld v. J.A. Jones Const. Co.*, 357 So. 2d 401, 402 (Fla. 1978). However, there has been at least one decision which determined that the “accrual date” of the statute of limitations began on the date of injury, and was apparently unaffected by the plaintiff’s lack of knowledge at that time of the product’s defect which had caused the injury. *Walker v. Beech Aircraft Corp.*, 320 So. 2d 418 (Fla. 3d Dist. Ct. App. 1975) (where a Florida two year wrongful death statute of limitations barred an action brought 35 months after plaintiff’s decedent’s death).

the date of delivery of the product.³⁷ As a matter of substantive law, this statute of repose imposes an outside cut-off date beyond which no lawsuit may be instituted, irrespective of the accrual date of the cause of action.³⁸

The arguments against the implementation of such a statute of repose in products liability cases center on three principal bases: due process, equal protection and state constitutional provisions which guarantee access to the courts. The very heart of the due process argument is that a statute of repose, which cuts off the manufacturer's liability after a specified time has passed, deprives an injured person of a cause of action for his injuries.³⁹ However strong this argument may seem to be, it has enjoyed little or no success. The courts have consistently agreed that the legislature may limit, or in fact, abolish, a right of access to the courts for redress for a particular injury under certain circumstances. "The legislature unquestionably has the power to shorten statutes of limitation, which are part of the remedial law of the state."⁴⁰ "[W]here mere inchoate rights are concerned, depending for their original existence on the law itself, they are subject to be abridged

37. FLA. STAT. § 95.031(2) (1981).

38. By way of illustration, graph (a) depicts no statute of repose (manufacturers' perpetual liability) and graph (b) depicts a 12 year statute of repose, such as in Florida (cutting off the manufacturers' liability at year 12).



39. See, e.g., *Hill v. Forrest & Cotton, Inc.*, 555 S.W.2d 145, 149 (Tex. Civ. App. 1977).

40. *Carpenter v. Florida Cent. Credit Union*, 369 So. 2d 935, 937 (Fla. 1979).

or modified by law.”⁴¹

However, Florida’s statute of repose does not provide for an extension of the limitation period for someone injured shortly before the expiration period. It follows that the argument for a due process violation becomes stronger as an individual’s limitation period becomes shorter. This arbitrary aspect of the statute would presumably cause a court to hold it unconstitutional as applied to an individual who was injured on the last day of the twelve-year period. The author’s proposal is to supplement Florida’s statute of repose with a savings clause which provides for those injuries occurring near the expiration of the twelve-year period:

but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . , regardless of the date the defect in the product . . . was or should have been discovered, except that, *if the cause of action accrues more than 11 years but not more than 12 years after the initial delivery, the action may be commenced at any time within one year after the cause of action accrues.*

With respect to equal protection challenges, courts must inquire whether the statute of repose has established “a classification which has no rational relation to a proper state objective.”⁴² “A statute of limitation does not deny equal protection if it is based on a rational distinction among classes of persons,”⁴³ and rests on “some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed.”⁴⁴ Since the scope of the product liability statute of repose in Florida theoretically creates a classification which is congruent with the class of persons whose liability is intended to be limited—all plaintiffs filing suit after the statutory period has run—and the statute treats differently persons in different circumstances,⁴⁵ it has thus far withstood equal protection challenges.⁴⁶

41. Hart v. Bostwick, 14 Fla. 162, 180 (1872); see also Kluger v. White, 281 So. 2d 1 (Fla. 1973) and the text accompanying footnote 55.

42. Purk v. Federal Press Co., 387 So. 2d 354, 357 (Fla. 1980).

43. *Id.* at 357.

44. Gammon v. Cobb, 335 So. 2d 261, 264 (Fla. 1976).

45. Compare Overland Construction Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979), with Bauld, 357 So. 2d 401. See also Purk, 387 So. 2d at 357-58.

The Florida Constitution, however, guarantees that "[t]he courts shall be open to every person for redress of any injury. . . ."⁴⁷ Thus, relying heavily upon this constitutional mandate, the Florida Supreme Court recently declared unconstitutional a statute of repose which, when applied, presented an absolute bar to the courts.⁴⁸ Section 95.11(3)(c) of the Florida Statutes⁴⁹ absolutely barred suits for construction defects brought against contractors more than twelve years after the construction which produced the injury was completed. The court in *Overland Construction Co. v. Sirmons*⁵⁰ held that the statute violated the right of access to the courts guaranteed by Article 1, Section 21 of the Constitution of the State of Florida, as applied to persons who are injured after the expiration of the twelve-year statute of repose period.⁵¹

The *Overland* court reasoned that if such a statute of repose were given effect to provide absolute immunity to responsible parties after the statutory period, the injured plaintiff's cause of action would already be "barred by the twelve year limitation when it first accrued—that is, when his injuries occurred."⁵² Consequently, "[n]o judicial forum would ever have been available to [such plaintiffs] if the

46. *Purk*, 387 So. 2d at 357-58.

47. FLA. CONST. art. 1, § 21. Thirty-seven other state constitutions contain "access to the courts" guarantees. 25 ATLA L. REP. 295 (Sept. 1982).

48. *Overland*, 369 So. 2d 572. The question of interpretation and the constitutionality of a statute is a question of law for the court. *City of St. Petersburg v. Austin*, 355 So. 2d 486 (Fla. 2d Dist. Ct. App. 1978). When deciding the constitutionality of a statute which operates to limit the amount of time a claimant has to bring her action, the court should determine whether that party was afforded a reasonable time in which to act before being barred under the applicable statute. *See Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190 (1922); *Buck v. Triplett*, 159 Fla. 772, 32 So. 2d 753 (1947); *Campbell v. Horne*, 147 Fla. 523, 3 So. 2d 125 (1941).

49. FLA. STAT. § 95.11(3)(c) (1975). The portion of this statute most germane to our discussion provided that no action founded on the alleged defective design, planning or construction of an improvement to real property shall be brought against the professional engineer, registered architect, or licensed contractor after 12 years from the completion of the improvements which produced the injury. The present section 95.11(3)(c) of the Florida Statutes provides for a 15 year limitation. FLA. STAT. § 95.11(3)(c) (1981).

50. 369 So. 2d 572.

51. *Id.* at 575.

52. *Id.*

. . . prohibitory portion of the statute were given effect.”⁵³ In reaching this conclusion, the *Overland* court quoted the earlier Florida Supreme Court decision of *Kluger v. White*,⁵⁴ which held:

[t]he legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such a right, and no alternative method . . . can be shown.⁵⁵

The *Overland* court labored to distinguish its earlier decision in *Bauld v. J. A. Jones Construction Co.*⁵⁶ which appears, at first glance, to be in direct conflict with the holding in *Overland*. In *Bauld*, the court sustained the very provision that the *Overland* court deemed unconstitutional as applied.⁵⁷ The distinction, however, rests in the fact that the plaintiff in *Bauld* was not absolutely denied access to the courts as was the plaintiff in *Overland*.⁵⁸

In *Bauld*, the plaintiff's injury occurred two and one-half years prior to the enactment of the applicable statute of repose.⁵⁹ At the time of the enactment, the plaintiff's cause of action would have been barred by the twelve-year statute of repose because the allegedly defective construction had been completed more than twelve years before.⁶⁰ However, section 95.022 of the Florida Statutes provides a “savings clause”, which states that any action that would be barred on January 1, 1975, the effective date of the statute of repose, may be brought

53. *Id.*

54. *Kluger*, 281 So. 2d 1.

55. *Overland*, 369 So. 2d at 573 (quoting *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973)). *Kluger* is regarded as “[t]he polestar decision for the construction of [article 1, section 21 of the Constitution of the State of Florida].” *Overland*, 369 So. 2d at 573.

56. 357 So. 2d 401.

57. *Id.* at 403. See *supra* note 49 for a summary of the text of section 95.11(3)(c) of the Florida Statutes.

58. *Bauld*, 357 So. 2d at 403.

59. The plaintiff's injury in *Bauld* occurred on July 8, 1972. *Bauld*, 357 So. 2d at 401. Section 95.11(3)(c) of the Florida Statutes took effect on January 1, 1975. FLA. STAT. § 95.022 (1981).

60. *Bauld*, 357 So. 2d at 401-02. The defendant did its last construction work on the project no later than August 16, 1961. *Id.* at 401.

anytime before January 1, 1976.⁶¹ Therefore, the plaintiff in *Bauld* had a period of approximately three and one-half years in which her action could have been filed—after the date of her injury and prior to the extended deadline imposed by the statute of repose and savings clause. Consequently, the statute of repose as applied to these facts did not abolish a cause of action, but merely abbreviated the period within which suit could be commenced from four to three and one-half years.⁶²

These decisions have had profound effects in the development of products liability law, particularly with respect to health-related products. For example, the Florida Supreme Court in *Diamond v. E. R. Squibb & Sons, Inc.*⁶³ recently invalidated the twelve-year products liability statute of repose, section 95.031(2) of the Florida Statutes, as it applied to a plaintiff who filed suit twenty-one years after the delivery of the product.⁶⁴ The plaintiff in *Diamond* sought to recover damages resulting from the cancer-producing qualities of the synthetic drug Stilbetin (also known as diethylstilbestrol or DES), which was prescribed to pregnant mothers to prevent miscarriages between 1947 and 1971. In 1971, however, it was discovered that some, but not all, prenatally exposed daughters of mothers who had ingested DES were developing cancerous vaginal abnormalities.⁶⁵ Because DES does not

61. FLA. STAT. § 95.022 (1981) states:

[t]his act shall become effective on January 1, 1975, but any action that will be barred when this act becomes effective and that would not have been barred under prior law may be commenced before January 1, 1976, and if it is not commenced by that date, the action shall be barred.

Id. Hence, an additional year was given to those plaintiffs whose right to bring an action was cut off on January 1, 1975. *Id.* A one year savings period has been deemed to be reasonable. *Campbell v. Horne*, 147 Fla. 523, 3 So. 2d 125 (1941).

62. *Bauld*, 357 So. 2d at 403. Four years was the applicable statute of limitations for construction defect actions. FLA. STAT. § 95.11(4) (1971).

63. 397 So. 2d 671 (Fla. 1981).

64. *Id.* at 672.

65. See Podgers, *DES Ruling Shakes Products Liability Field*, 66 A.B.A. J. 827 (1980). It is interesting to note that the California Supreme Court has recently ruled that DES plaintiffs may proceed to trial against several drug companies that generically produced DES where it is difficult, if not impossible, to specifically determine which company produced the injury-causing drug. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). If found liable to the plaintiffs, each of the manufacturer-defendants would only be responsible for its approximate per-

adversely affect all prenatally exposed daughters, the statute of limitation for such an action begins to run from the time the defect (or, in this case, the injury) was or should have been discovered.⁶⁶ Determining precisely when the defect, i.e. injury, *should* have been discovered can be very difficult where, as in the DES cases, a latent defect exists which only affects a portion of those consumers exposed to the product. Ordinarily, it is a question of fact as to whether one by exercise of reasonable diligence should have known there was a cause of action against a defendant, and should be left to the jury to decide.⁶⁷

In *Diamond*, the prenatal daughter was exposed to DES on or before April 1, 1956, and "discovered" the defect in May, 1976.⁶⁸ Thus, when she instituted an action for negligence and products liability on April 1, 1976 (twenty-one years after exposure to the drug), her action would have long been barred by strict application by the statute of repose. However, applying the principle laid down in *Overland*, the court in *Diamond* held:

[t]he operation of section 95.031(2) in this case has the same effect as it had in *Overland*. . . . The statute of limitations operated there to bar the cause of action before it ever accrued, so that no judicial forum was available to the aggrieved plaintiff. . . . We therefore hold that as applied in this case, section 95.031(2) violates the Florida Constitution's guaranty of access to courts.⁶⁹

In another similar situation, the United States District Court for the Southern District of Florida in *Ellison v. Northwest Engineering Co.*⁷⁰ held section 95.031(2) of the Florida Statutes to violate the state's "access to courts" constitutional mandate where the plaintiff suffered injuries through use of a machine manufactured and delivered

centage market share. *Id.* at 613-14, 607 P.2d at 937, 163 Cal. Rptr. at 145.

66. FLA. STAT. § 95.031(2) (1981).

67. First Fed. Sav. & Loan Ass'n of Wisconsin v. Dade Fed. Sav. & Loan Ass'n, 403 So. 2d 1097 (Fla. 5th Dist. Ct. App. 1981); Rosen v. Sparber, 369 So. 2d 960 (Fla. 3d Dist. Ct. App. 1978).

68. *Diamond*, 397 So. 2d at 671.

69. *Id.* at 672.

70. 521 F. Supp. 199 (S.D. Fla. 1981) (applying Florida law in a diversity action).

twenty-three years before the action was begun.⁷¹ The *Ellison* court recognized the two part test announced by the Florida Supreme Court in *Kluger*: (1) whether an action for negligence, warranty, and strict liability existed in 1968 when the "access to courts" provision of the Florida Constitution was re-adopted, and (2) whether this constitutionally protected right would be abolished without providing any reasonable alternative if the statute of repose was strictly applied in the given case.⁷² Answering both questions in the affirmative, the court held the twelve-year products liability statute of repose, which would have terminated the plaintiff's ability to sue even before the injury occurred, to be violative of article I, section 21, of the Florida Constitution as applied to the facts of this case.⁷³ Consequently, as a result of the decision in *Overland*, other courts have declared the products liability statute of repose to be unconstitutional insofar as it provides an absolute bar to lawsuits brought more than twelve years from the date the product was delivered.⁷⁴

To complete the analysis, we must examine *Purk v. Federal Press Co.*,⁷⁵ a recently decided Florida Supreme Court decision. The *Purk* court followed the reasoning in *Bauld*,⁷⁶ decided two years before, to uphold the constitutionality of section 95.031(2) as it applied to the facts of that case.⁷⁷ As in *Bauld*, the plaintiff in *Purk* was injured before the statute of repose took effect.⁷⁸ A punch press, delivered no later than June 2, 1961, injured Mrs. Purk on April 24, 1973.⁷⁹ Finally, Mrs. Purk brought a products liability action on April 13, 1976, alleging that the press was defective and negligently manufactured.⁸⁰ Viewing the effective date of January 1, 1975, for the statute of repose and the one-year "savings clause"⁸¹ together, the action should have been

71. *Id.* at 202.

72. *Id.*

73. *Id.*

74. See *Ellison*, 521 F. Supp. 199; *Diamond*, 397 So. 2d 671; *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980).

75. 387 So. 2d 354 (Fla. 1980).

76. *Bauld v. J.A. Jones Const. Co.*, 357 So. 2d 401 (Fla. 1978).

77. *Purk*, 387 So. 2d at 357.

78. *Id.* at 355-56; see *Bauld*, 357 So. 2d at 401.

79. *Purk*, 387 So. 2d at 355-56.

80. *Id.* at 356.

81. FLA. STAT. § 95.022 (1975). For the full text of this provision, see *supra* note

commenced on or before January 1, 1976, to be timely. Since it was not filed until April of that year, the Florida Supreme Court affirmed summary judgment for the defendant.⁸² In effect, Mrs. Purk's statute of limitation was shortened from four years to two years and eight months from the date she "discovered" the defect—the date of her injury. Hence, Mrs. Purk's cause of action was not abolished, and application of the statute in her case was held to be constitutional.⁸³ The court implicitly held, therefore, that two years and eight months was a reasonable time in which Mrs. Purk could have commenced her products liability action,⁸⁴ after which her action was forever barred.

61.

82. *Purk*, 387 So. 2d at 357.

83. *Id.*

84. *Id.*; see *Cates v. Graham*, 1982 Fla. L.W. 907 (Fla. 3d Dist. Ct. App. Apr. 20, 1982), *rev'd on rehearing*, 1983 Fla. L.W. 621 (Fla. 3d Dist. Ct. App. Feb. 22, 1983), where the time within which a medical malpractice action could be brought was shortened to approximately five months and was deemed to be reasonable. *Cates*, 1983 Fla. L.W. at 621. The Florida medical malpractice statute of limitation states:

(b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, *in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued.*

* * * * *

FLA. STAT. § 95.11(4)(b) (1981) (emphasis added).

In *Cates*, the minor plaintiff last received medical treatment by his doctor on July 4, 1975. *Cates*, 1983 Fla. L.W. at 621. Under section 95.11(4)(b) of the Florida Statutes, the plaintiff would have had until July 4, 1979 to bring his action for malpractice, at which time his action would become time barred. Notwithstanding the plaintiff's knowledge on February 6, 1979 that the medical treatment had been wrongful (a factual finding by the court), he delayed filing his medical malpractice mediation claim until January 9, 1980. *Cates*, 1983 Fla. L.W. at 621.

In affirming summary judgment in favor of the defendant doctor, the court held that the statute, as applied to the facts of this case, did not operate as a complete bar to the plaintiff's action. *Id.* Moreover, the court held five months to be a reasonable limitation period within which plaintiff should have brought his action. *Id.* In a special concurrence by Judge Jorgenson of the Third District Court of Appeal, he writes "[w]ere I free to write upon a clean slate, I would hold that section 95.11(4)(b) is unconstitutionally applied to this minor plaintiff. Under the principles announced in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), I cannot do so and, therefore, concur in this result." *Id.* The *Hoffman* court held that "a District Court of Appeal does not have

There are, however, several interrelated problems inherent in the *Purk* and *Bauld* line of cases. First, it is possible that the plaintiffs in both cases erroneously believed their statute of limitations to be four full years from discovery of the defect. This, of course, means four years from the date of injury. Failure to discover the delivery date of the machine and ending date of construction in *Purk* and *Bauld*, respectively, and failure to file their lawsuits timely proved to be fatal in both actions.

Second, in the area of products liability litigation, section 95.031(2) of the Florida Statutes imposes a duty on all plaintiffs' attorneys to promptly determine the delivery date of the injury-causing product, conceptually a difficult task. Failing to do so may be grounds for malpractice. Assuming potential defendants would cooperate in generating this information, other problems still exist. Records bearing the date of delivery of the product may not have been kept, or they may have been lost or destroyed. An alternative is to hastily file suit

the authority to overrule a decision of the Supreme Court of Florida." 280 So. 2d at 440. Judge Jorgenson was apparently referring to the prior Florida Supreme Court decision in *Bauld*, upon which reasoning the majority opinion in *Cates* was based. *Cates*, 1983 Fla. L.W. at 621.

Judge Baskin, the third member of the panel in the *Cates* decision, succinctly pinpointed the issue in her dissent: "whether the five months between discovery of [plaintiff's] injury and the absolute four-year bar to bringing suit under section 95.11(4)(b) constituted a reasonable time under the Florida Constitution [article 1, § 21] for commencement of a medical malpractice claim." *Cates*, 1983 Fla. L.W. at 621 (Baskin, J., dissenting). She went on to state:

[i]n my opinion, the date of discovery is significant in determining whether reasonable time remains for the commencement of an action. For these reasons, I would hold that the five-month period between the date of discovery and the expiration of the final four-year repose provision of section 95.11(4)(b) was insufficient to afford appellant his constitutionally guaranteed right of access to court. I would reverse.

Id. This author is aware of a similar situation involving a Broward County (dental) medical malpractice action which was to be filed the beginning of May, 1983. This case involves a plaintiff whose action was technically barred eight or nine days after he discovered that he had a cause of action. Clearly, the medical malpractice statute of repose is unconstitutional as applied to these facts. Both due process and the Florida constitutional "access to courts" guarantee are violated by strict application of the repose statute. *See also Bauld*, 357 So. 2d 401, where the court implicitly held an abbreviated period of approximately three and one-half years to bring an action for a construction defect to be reasonable. *Bauld*, 357 So. 2d at 403.

when there is legitimate concern over the running of the twelve-year statute of repose.⁸⁵ This does not comport with public policy, which discourages frivolous and non-meritorious claims.

Third, this principle presents a dichotomy in that the plaintiffs in *Bauld* and *Purk* are barred from presenting their claims which arose less than twelve years from the acts or occurrences complained of, while plaintiffs in the *Overland* and *Diamond* line of cases are permitted to bring their actions (after fourteen and twenty-one years, respectively).

Through the benefit of a hypothetical which is analogous to the situation in *Purk*, we can develop this dilemma more fully. Suppose, for example, a product (assumed to be defective) was delivered on June 2, 1963, and the plaintiff was injured by it on April 24, 1975. Since the plaintiff was injured after the effective date of the statute of repose⁸⁶ (January 1, 1975), the cause of action was not extinguished by the implementation of the statute on that date. Therefore, the one-year "savings clause" is of no benefit to her.⁸⁷

Plaintiff's cause of action, however, would terminate twelve years after the delivery date of the product (June 2, 1975), according to the tenor of the repose statute. Therefore, the plaintiff would only have forty days from her injury in which to file suit. If the plaintiff attempts to file suit after that time, the court could, of course, deem the statute of repose to be unconstitutional as applied to her, since it failed to afford her a reasonable time in which to bring her action.⁸⁸ Strict application of the statute, however, would create a *Purk trap*⁸⁹ for the un-

85. FLA. STAT. § 95.031(2) (1975).

86. *Id.*

87. See FLA. STAT. § 95.022 (1981). For the text of the "savings clause," which only provides for an additional year (until January 1, 1976) if an existing action is terminated by the statute of repose on its effective date (January 1, 1975), see *supra* note 61.

88. However, see *Cates*, *supra* note 84, where the medical malpractice statute of repose operated to limit the claimant's period within which he could bring suit to five months, which was deemed to be reasonable. This author agrees with the lengthy dissent in the *Cates* decision, and feels that the plaintiff in *Cates* suffered such a disadvantage that the statute of repose should have been declared unconstitutional as applied to the facts in that case.

89. This clever phrase has been used on numerous occasions to describe this ardent situation by Joel D. Eaton, Esq., of the law firm of Podhurst, Orseck, Parks, Josef-

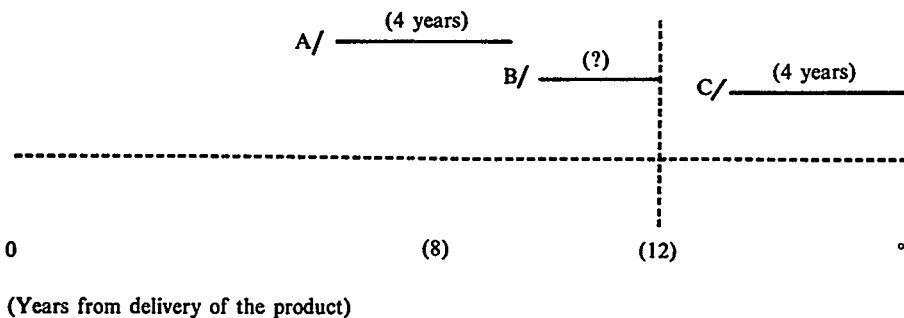
wary, who may suddenly find themselves in this uncomfortable position.⁹⁰

Although the principles supporting statutes of repose have evolved over many years, this is a relatively new concept to Florida. Manufacturers and potential plaintiffs necessarily have adopted polarized positions in arguments for and against the implementation of these "ultimate repose" statutes. "At issue is the appropriate balance between [the Florida constitutional guarantee of access to courts] and the federal Constitution, the role of the legislature to represent the popular will, and the duty of the courts to preserve [individual's] rights without encroaching upon legislative prerogatives."⁹¹

sberg, Eaton, Meadow & Olin, P.A., Miami, Florida. It was Joel Eaton's suggestion that this author "sound the alarm" in this area of law which provided the incentive to complete the required research.

90. Under the Florida statute of repose, it is significant to note that only the legal rights of those individuals injured by defective products between eight and twelve years old are affected by operation of the statute. If a plaintiff is injured by a defective product between years one and eight, or after twelve, he will theoretically have four years in which to bring his cause of action. Plaintiff's injured by products between eight and twelve years old will, as the courts currently apply the statute, be limited by one more day for each day the product has aged over eight years.

This time-line shows how plaintiffs A and C have the traditional four-year period in which to file suit. Plaintiff C's action is permissible because, under the *Overland* line of cases, the statute of repose is unconstitutional as an absolute bar (his action was barred before it ever accrued). Plaintiff B's cause of action is extinguished by operation of the statute of repose at year 12, irrespective of the actual time in which B had to bring his action or when the defect was or should have been discovered.



91. McGovern, *Symposium Products Liability: The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 581 (1981).

From the manufacturer's point of view, statutes of repose would affect few people adversely but would permit rather substantial savings; i.e., lower consumer costs due to lower products liability insurance premiums. From the perspective of potential plaintiffs, there is still concern for the few individuals who would receive no compensation from the manufacturer for injuries caused by older defective products. Recently discovered latent defects arising long after use of the product complicate this position. Where, as in Florida, there is a constitutional guarantee of "access to the courts," this position becomes even more salient. In addition, recently available empirical data suggests that the results desired by the manufacturing industry are *not* being achieved through enactment of these statutes of repose.⁹² Thus, if insurance premiums are not significantly affected by the enactment of repose legislation, serious questions arise as to the validity of these statutes when they operate to bar an individual's right to redress for injury.

Conclusion

The Florida Legislature, persuaded by the aftermath of the "products liability revolution" witnessed in the last two decades, erred in 1975 by annexing "ultimate repose" limitations to existing products liability statutes of limitations. As it now stands, section 95.031(2)⁹³ affords disparate application, as examined in recent decisions,⁹⁴ with no significant benefit to the manufacturing industry.⁹⁵ Repeal or modifica-

92. See *Lankford*, *supra* note 27. "Although a statute of repose certainly would reduce recoveries by persons injured by products, there may not be a corresponding reduction in insurance premium rates. An eight-to-ten year statute of repose, for example, would be too long to improve the predictability of insurance claims." FINAL REPORT, cited in McGovern, *supra* note 91, at 595. See generally Martin, *supra* note 19, at 752; Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663 (1978). One study estimates that over 97 percent of product-related accidents occur within six years of the time the product was purchased and, in the capital goods area, 83.5 percent of all bodily injury accidents occur within ten years of manufacture. MODEL ACT, *supra* note 2, at 62,733 (citing Insurance Services Office, *Product Liability Closed Claim Survey: A Technical Analysis of Survey Results*, at 105-08 (1977)).

93. FLA. STAT. § 95.031(2) (1981).

94. See *Overland*, 369 So. 2d 572; *Purk*, 387 So. 2d 354.

95. McGovern, *supra* note 91.

tion of this provision is recommended, because it presently imposes upon the guaranteed "access to courts" provision of the Florida Constitution.⁹⁶ In the meantime, the full ramifications of the *Bauld* and *Purk* decisions are yet to be seen.

William M. Tuttle

96. FLA. CONST., art. 1, § 21.

Will the Real Party in Interest Please Stand Up? Florida Statutes Section 627.7262 as Amended

In 1978 Florida Statutes section 627.7262¹ was declared unconstitutional in *Markert v. Johnston*² as an invasion of the Florida Supreme Court's rulemaking authority. The statute prohibited joinder of motor vehicle liability insurance companies at the commencement of lawsuits against insured persons, but also provided for possible joinder of the insurer at a later stage in the proceedings.³ Therefore the court determined that the statute involved procedural aspects of trial and was in

1. FLA. STAT. § 627.7262 (1977) read:

Nonjoinder of Insurers.

(1) No motor vehicle liability insurer shall be joined as a party defendant in an action to determine the insured's liability. However, each insurer which does or may provide liability insurance coverage to pay all or a portion of any judgment which might be entered in the action shall file a statement, under oath, of a corporate officer setting forth the following information with regard to each known policy of insurance:

- (a) The name of the insurer.
- (b) The name of each insured.
- (c) The limits of liability coverage.
- (d) A statement of any policy or coverage which said insurer reasonably believes is available to said insurer filing the statement at the time of filing said statement.

(2) The statement required by subsection (1) shall be amended immediately upon discovery of facts calling for an amendment to said statement.

(3) If the statement or any amendment thereto indicates that a policy or coverage defense has been or will be asserted, then the insurer may be joined as a party.

(4) After the rendition of a verdict, or final judgment by the court if the case is tried without a jury, the insurer may be joined as a party and judgment may be entered by the court based upon the statement or statements herein required.

(5) The rules of discovery shall be available to discover the existence and policy provisions of liability insurance coverage.

2. 367 So. 2d 1003 (Fla. 1978).

3. FLA. STAT. § 627.7262(3) (1977).

violation of Article II, Section 3, of the Florida Constitution.⁴

Prior to this 1976 statute, joinder of liability insurers in actions against the insured tortfeasor was permitted as a result of the landmark Florida Supreme Court decision in *Shingleton v. Bussey*.⁵ This case established that a direct cause of action⁶ against insurers in motor vehicle liability insurance coverage cases inures to injured persons as third party beneficiaries of the insurance contract. The court declared this to be the result of the prevailing public policy of Florida.⁷ The legislature's first attempt to reverse this direction of the court was struck down by the *Markert* decision. Apparently determined not to be thwarted, the legislature re-enacted Florida Statute Section 627.7262,⁸ albeit revised,⁹ in an attempt to cure the prior constitutional defects.

4. FLA. CONST. art. II, § 3 provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

5. 223 So. 2d 713 (Fla. 1969).

6. The court relied upon rule 1.210(a), of the Florida Rules of Civil Procedure, which provides for joinder of parties. *See* Russell v. Orange County, Florida, 237 So. 2d 192 (Fla. 4th Dist. Ct. App. 1970); Kephart v. Pickens, 271 So. 2d 163 (Fla. 4th Dist. Ct. App. 1972) (holding that the insured is an indispensable party in such actions).

7. *Shingleton*, 223 So. 2d at 715.

8. FLA. STAT. § 627.7262, (Supp. 1982) (effective October 1, 1982). On Apr. 7, 1982, during the fourth special session of the 1982 Legislature, the Revised Insurance Code was passed by unanimous vote in both Houses. HOUSE COMMITTEE ON INSURANCE, STAFF REPORT, 1982 Ins. Code Sunset Revision (HB4F; As Amended by HB 10G), at 4 (1982) [hereinafter cited as STAFF REPORT].

9. FLA. STAT. § 627.7262 (Supp. 1982) now provides:
Nonjoinder of insurers.

(1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract, that such person shall first obtain a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.

(2) No person who is not an insured under the terms of a liability insurance policy shall have any interest in such policy, either as a third party beneficiary or otherwise, prior to first obtaining a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.

(3) Insurers are affirmatively granted the substantive right to insert in lia-

Joinder of liability insurers as codefendants has been the subject of debate for well over a decade in this state. On the one hand, insurance and defense counsel vigorously oppose joinder of the liability insurer (the company) in actions against their insureds (the tortfeasors), and therefore support the amended statute. Their principal objection to joinder of the insurer centers on the supposedly negative impact on the jury of knowledge of the defendant's insurance coverage. On the other hand, plaintiffs' counsel just as vigorously favor joinder of the liability insurer, and therefore oppose the amended statute. Their principal contention is that the insurance company investigates the case, hires the attorneys, controls the negotiations, settlements and litigation, and has a direct financial interest in the outcome. Therefore, it is argued, the liability insurer is a real party in interest and should be included in the lawsuit.

Further debate on the joinder issue has occurred between the legislature and the judiciary, as evidenced by the re-enactment of this non-joinder statute in response to the *Market* decision. These legal arguments involve the separate powers of the legislature and the judiciary, and are based on the nebulous distinction between substantive and procedural law.

This article focuses on the history of these arguments and the public policy and constitutional issues involved. The amended statute is examined in light of these issues, and an attempt is made to answer the current question of whether the statute will withstand judicial scrutiny under the substantive-procedural test.¹⁰

bility insurance policies contractual provisions that preclude persons who are not designated as insureds in such policies from bringing suit against such insurers prior to first obtaining a judgment against one who is an insured under such policy for a cause of action which is covered by such policy. The contractual provisions herein authorized shall be fully enforceable.

10. The current questions of whether the statute can be applied retroactively, and whether retroactive application of the statute violates a plaintiff's constitutional rights are not within the scope of this article.

Development Of The Law

Prior to *Shingleton*, Florida followed the majority view¹¹ which prohibits maintenance of a cause of action directly against the insurer until the tortfeasor's liability is established.¹² At common law, the joinder of the insurer was often denied on the ground that an action *ex contractu* cannot be joined with an action *ex delicto*.¹³ In most jurisdictions today, however, denial of direct actions against the liability insurer is generally based on "no action" or "nonjoinder" clauses contained in the insurance policies.¹⁴ Generally, unless the policy specifically provides for direct action against the liability insurer, or is construed to so provide, direct action by the injured party is only permitted by statute.¹⁵

The *Shingleton* court hurdled the obstacles of both a "no action - nonjoinder" clause in the policy¹⁶ and prior decisions which had refused to recognize the injured persons as third party beneficiaries of the insurance contract.¹⁷ The court recognized that the majority of jurisdic-

11. See 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4861 (Rev. 1981).

12. *Artille v. Davidson*, 126 Fla. 219, 170 So. 707 (1936), *overruled in Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969); *Hayes v. Thomas*, 161 So. 2d 545 (Fla. 2d Dist. Ct. App. 1964); *Thompson v. Safeco Ins. Co.*, 199 So. 2d 113 (Fla. 4th Dist. Ct. App. 1967).

13. See, e.g., *Jennings v. Beach*, 1 F.R.D. 442 (D. Mass. 1940); *Conwell v. Hays*, 103 W. Va. 69, 136 S.E. 604 (1927); *Ellis v. Bruce*, 215 Iowa 308, 245 N.W. 320 (1932); *Baggett v. Jackson*, 244 Ala. 404, 13 So. 2d 572 (1943).

14. See 8 J. APPLEMAN, *supra* note 11.

15. For a discussion of direct action statutes see 8 J. APPLEMAN, *supra* note 11; Comment, *The Louisiana Direct Action Statute*, 22 LA. L. REV. 243 (1961); Comment, *The Insurer as Party Defendant in Automobile Accident Cases*, 1953 Wis. L. REV. 688. Direct action legislation was introduced in both houses of the 1969 Florida Legislature. Fla. S. 468, Reg. Sess. (1969) was tabled May 6, 1969. Fla. H.R. 1120, Reg. Sess. (1969) died in committee June 6, 1969. Comment, *Civil Procedure: Judicial Creation of Direct Action Against Automobile Liability Insurers*, 22 U. FLA. L. REV. 145, 146 n.12 (1969).

16. The insurance contract provided that: "No action shall lie against the Company . . . until the amount of the obligation of the Policyholder . . . shall have been finally determined by judgment after trial. . . . This policy shall not give any right to join the Company in any action to determine the liability of an insured person or organization." Brief for Federation of Insurance Counsel and Florida Defense Lawyers Association, amici curiae at 9, *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969).

17. *Artille v. Davidson*, 126 Fla. 219, 170 So. 707 (1936)(under an indemnity

tions sustained such clauses as a bar to joinder in actions to determine the insured's liability. Nonetheless, after emphasizing Florida's public policy favoring elimination of multiplicity of suits, the court construed the policy restriction to grant to the insurer only the right to assert nonliability; the policy restriction did not grant the right to assert nonjoinder.¹⁸ The court further reasoned that securance of motor vehicle liability insurance "is an act undertaken by the insured with the intent of providing a ready means of discharging his obligations that may accrue to a member or members of the public as a result of his negligent operation of a motor vehicle. . . ."¹⁹ Finding this intent, the court determined that motor vehicle liability insurance is "amenable to the third party beneficiary doctrine"²⁰ by operation of law.

After thus rejecting the insurance company's assertion that the no action clause prohibited joinder, the court accepted the appellate court's analysis and conclusion that the insurer is a real party in interest in litigation brought against the insured.²¹ The appellate court reached this decision after taking notice of the policy provisions whereby the insurance company (1) reserves the right to control litigation against its insured, (2) is obligated to defend the litigation, and (3) will be liable for any resulting assessment of damages up to the policy

policy, no action could be maintained by a third party since no breach of contract which would create in the insured a right to maintain an action on the policy); *Hayes v. Thomas*, 161 So. 2d 545 (Fla. 2d Dist. Ct. App. 1964) (contention that a liability policy obtained pursuant to Florida's Financial Responsibility Act, FLA. STAT. ch. 324 (1967) permitted maintenance of a direct action against the insurer rejected); *Thompson v. Safeco Ins. Co.*, 199 So. 2d 113 (Fla. 4th Dist. Ct. App. 1967) (court noted Florida does not recognize the third party beneficiary doctrine under automobile liability insurance policies in the absence of a policy provision).

18. *Shingleton*, 223 So. 2d at 718.

19. *Id.* at 716.

20. *Id.* Appellate courts soon expanded this rationale to other forms of liability insurance. *Duran v. McPherson*, 233 So. 2d 639 (Fla. 4th Dist. Ct. App. 1970) (*Shingleton* applied to professional liability insurance); *Shipman v. Kinderman*, 232 So. 2d 21 (Fla. 1st Dist. Ct. App. 1970) (*Shingleton* applied to medical malpractice insurance); *Liberty Mut. Ins. Co. v. Roberts*, 231 So. 2d 235 (Fla. 3d Dist. Ct. App. 1970) (*Shingleton* applied to homeowners liability insurance). Finally in *Beta Eta House Corp., Inc., of Tallahassee v. Gregory*, 237 So. 2d 163 (Fla. 1970), the Florida Supreme Court expressly held the *Shingleton* principles applied to other forms of liability insurance.

21. *Bussey v. Shingleton*, 211 So. 2d 593 (Fla. 1st Dist. Ct. App. 1968).

limits.²² Therefore, as a real party in interest, the insurer may be joined as a codefendant under the liberal joinder provisions of rule 1.210(a) of the Florida Rules of Civil Procedure.²³ Recognizing that this rule promotes the goal of "providing an efficient and expeditious adjudication of the rights of persons possessing adverse interests in a controversy,"²⁴ the Florida Supreme Court illustrated how an injured plaintiff may be adversely affected if he cannot immediately align the insurance company with the insured. Citing *Bergh v. Canadian Universal Insurance Co.*²⁵ and *Sellers v. United States Fidelity & Guaranty Co.*,²⁶ the court emphasized the importance of joinder to prevent defeat of a plaintiff's recovery. Assertions of policy defenses by the insurance company based on the possible negligence of the insured or absence of his motivation to protect the injured party are examples of when an injured person's recovery is defeated.

22. *Id.* at 596. The court also relied heavily on briefs filed in *In re Rules Governing Conduct of Attorneys in Florida*, (which was referred to as Case No. 35,524 by the *Bussey* court). This case involved a petition filed in 1966 by the Florida Bar Association seeking additional rules governing the conduct of "in house" counsel; the rule would have precluded attorneys for insurance companies from defending the insured. In opposing the adoption of the rule, counsel for the insurance industry openly admitted the "direct financial interest" of the insurer, . . . "an identity and community of interest in the defense of any suit brought against the insured," . . . [and] that the insurer . . . "has or claims an interest adverse to the plaintiff." *Bussey v. Shingleton*, 211 So. 2d at 595-96 (quoting various briefs filed in *In re Rules Governing Conduct of Attorneys in Florida*, Case No. 35,524).

23. Rule 1.210 provides:

PARTIES (a) Parties Generally. Every action may be prosecuted in the name of the real party in interest. . . . All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and *any person may be made a defendant who has or claims an interest adverse to the plaintiff*. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause.

(emphasis added).

24. *Shingleton*, 223 So. 2d at 718.

25. 216 So. 2d 436 (Fla. 1968). The fact that the court cited this malpractice case was an indication that the *Shingleton* joinder principles were not limited to motor vehicle liability insurers.

26. 185 So. 2d 689 (Fla. 1966). This was an uninsured motorist case involving policy questions.

After Shingleton

Shingleton's initial impact was described as "almost cataclysmic"²⁷ and as creating "near chaos in tort litigation in this State."²⁸ Although clearly reversing Florida law on joinder of automobile liability insurers, *Shingleton* left a number of questions unanswered;²⁹ most of these questions have been answered, albeit by a number of supreme court decisions on the same issues.

In *Beta Eta House Corp., Inc. of Tallahassee v. Gregory*,³⁰ while purporting to extend the principles announced in *Shingleton* to other forms of liability insurance, the court actually appeared to recede from some of them. In *Shingleton*, the court had advocated a "candid admission at trial of the existence of insurance coverage, the policy limits of same, and an otherwise aboveboard revelation of the interest of the insurer. . . ."³¹ However in *Beta Eta*, the court maintained that *Shingleton* merely requires "the parties to 'lay their cards on the table' in discovery proceedings, settlement negotiations, and pre-trial hearings. The existence or amount of insurance coverage has no bearing on the issues of liability and damages, and such evidence should not be considered by the jury."³² Within only a few months, the court translated candid admissions at trial into concealment of insurance.

Furthermore, *Singleton* indicated that if it should clearly appear in pretrial procedures that joinder of the insurer would interpose issues between the insured and insurance company that would unduly complicate the trial on the negligence issue, a motion to sever these issues for separate trial could be granted.³³ Yet in *Beta Eta*, the court held that the trial judge may, upon motion of either party, order separate trials

27. Jurisdictional Brief for Respondent at 2, North Miami Gen. Hosp., Inc. v. Roach, 237 So. 2d 173 (Fla. 1970)(consolidated with *Beta Eta* for oral argument purposes).

28. Brief for Petitioner at 8, North Miami Gen. Hosp., Inc. v. Roach, 237 So. 2d 173 (Fla. 1970).

29. See generally Comment, *Civil Procedure: Judicial Creation of Direct Action Against Automobile Liability Insurers*, 22 U. FLA. L. REV. 145 (1969).

30. 237 So. 2d 163 (Fla. 1970).

31. *Shingleton*, 223 So. 2d at 718 (emphasis added).

32. *Beta Eta*, 237 So. 2d at 165 (emphasis added).

33. *Shingleton*, 223 So. 2d at 720.

whenever the insurance company is joined.³⁴ Based on this holding, all an insurer codefendant needed to do was file a timely motion to sever, and the trial judge would grant it. Thus it appeared for a time that the remedial principles announced in *Shingleton* had quickly fallen into desuetude.³⁵

The severance issue was substantially resolved in *Stecher v. Pomeroy*.³⁶ After reaffirming the *Shingleton* conclusion that the insurer is a real party in interest in actions to determine the insured's liability,³⁷ the court concluded that *Shingleton* referred only to severance of issues between the insured and the insurer — *not* on the negligence issue. "[A]bsent a justiciable issue relating to *insurance*, such as a question of coverage or of the applicability or interpretation of the insurance policy or other such valid dispute on the matter of insurance coverage, there is no valid reason for a severance and it should NOT be granted."³⁸

In *Godshall v. Unigard Insurance Co.*,³⁹ the court further clarified the issue of severance in holding that in absence of a justiciable issue relating to insurance, severance could not be regarded as harmless

34. *Beta Eta*, 237 So. 2d at 165. The appellate court, at 230 So. 2d 495,500 (Fla. 1st Dist. Ct. App. 1970), concluded that

[p]ursuant to the provisions of this rule [Fla. R. Civ. P. 1.270(b), *Separate Trials*] the trial court *should* on motion of a party order that the issues relating to the cause of action sued upon be first tried under circumstances which exclude any reference to insurance, insurance coverage or joinder in the suit of the insurer as codefendant. After this trial has been concluded and a verdict rendered for the plaintiff, a second trial confined solely to the issue of insurance coverage should be held if such an issue has been raised. If no such issue is present, judgment against the insurer within the policy limits would follow the verdict rendered in the first trial on the merits.

(emphasis added).

35. See *Beta Eta*, 237 So. 2d at 166 (Boyd, J., dissenting in part and concurring in part) ("The decision distorts the law of severance and offends equal protection and due process by requiring special treatment of liability insurers not afforded other codefendants").

36. 253 So. 2d 421 (Fla. 1971).

37. *Id.* at 423. The court again cited the insurance counsel's arguments in *In re Rules Governing Conduct of Attorneys in Florida*, (Case No. 35,524). See *supra* note 22.

38. *Stecher*, 253 So. 2d at 424.

39. 281 So. 2d 499 (Fla. 1973).

error.⁴⁰

Underlying Rationale: Fear of Prejudicial Impact on Juries

The underlying rationale for prohibiting mention, and thus joinder, of liability insurance has traditionally been the assumption that juries are unduly swayed by knowledge that the defendant is insured.⁴¹ Supposedly, such knowledge increases both the size and number of plaintiff's verdicts. Based on this assumption, evidence of a defendant's liability insurance is not relevant as evidence of negligence, and is inadmissible.⁴²

Prior to *Shingleton*, Florida courts generally followed this traditional view, and held that deliberate injection of insurance into a tort trial was prejudicial error.⁴³ As previously noted,⁴⁴ the *Shingleton* court embraced a more modern view. "[T]he stage has now been reached

40. *But cf.* *Damico v. Lundberg*, 379 So. 2d 964 (Fla. 2d Dist. Ct. App. 1979)(Although the circuit court erred in dismissing the defendant's insurer, it was not reversible error. No amount of emphasizing the defendant's financial responsibility could have countered plaintiff husband's admission of his own negligence in entering the intersection.).

41. *See, e.g.*, *International Co. v. Clark*, 147 Md. 34, 42, 127 A. 647, 650 (1925); *Jeddeloh v. Hockenhull*, 219 Minn. 541, 553, 18 N.W.2d 582, 589 (1945); W. PIERSON, *THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS* § 140 (1956); Appleman, *Joinder of Policy Holder and Insurer as Parties Defendant*, 22 MARQ. L. REV. 75, 91 (1938); *In Texas Co. v. Betterton*, 126 Tex. 359, 88 S.W.2d 1039 (1936), adherence to this assumption approached absurdity when the court reversed the plaintiff's judgment against one of the largest oil companies in the world because the defendant's liability insurance coverage was brought to the attention of the jury.

42. *Compare* *Jeddeloh v. Hockenhull*, 219 Minn. 541, 554, 18 N.W.2d 582, 589 (1945), *with* *Herschensohn v. Weisman*, 80 N.H. 557, 558, 119 A. 705, 705 (1923)(defendant's reply to a caution about his driving shortly before the accident, "Don't worry; I carry insurance for that," was competent evidence bearing directly upon his negligence). *See generally* C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 168 (1954); Note, *Evidence: Proper disclosure during trial that defendant is insured*, 26 CORNELL L.Q. 137 (1940)(discussion of exceptions to the general rule of inadmissibility).

43. *Carls Markets v. Meyer*, 69 So. 2d 789, 793 (Fla. 1953); *Rose v. Peters*, 82 So. 2d 585, 586 (Fla. 1955); *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543, 545 (Fla. 2d Dist. Ct. App. 1963).

44. *See supra* text accompanying note 31.

where juries are more mature.”⁴⁵ Although the court confusingly receded from this position in *Beta Eta*,⁴⁶ it concluded in *Stecher v. Pomeroy*⁴⁷ that in order to “reflect the presence of financial responsibility, . . . [the presence of the insurer as the real party in interest] should be left apparent before the jury (without other express mention, of course). . . .”⁴⁸ Again, the court clarified its position in *Godshall v. Unigard Insurance Co.*,⁴⁹ by announcing that a legitimate purpose of joinder of the insurance company is to reflect the presence of financial responsibility.⁵⁰ “The interest which plaintiff has in presenting to the jury the truest possible picture of the existence of financial responsibility is much too important to allow the loss of that interest. . . .”⁵¹

Notwithstanding this neoteric posture of Florida courts, insurance and defense counsel staunchly assert that injection of insurance into trial unduly influences jury findings of liability and damages.⁵² Empirical studies do lend some support to this “prejudice theory,” and to the belief that a judge’s curative instructions are ineffective.⁵³ On the other

45. *Shingleton*, 223 So. 2d at 718.

46. *See supra* text accompanying note 32.

47. 253 So. 2d 421 (Fla. 1971).

48. *Id.* at 424. The court reasoned:

This offsets any indulgence by counsel or the jury with unfounded arguments like, “This poor, hard working truck driver and his family” approach, when in fact there is an ability to respond. It is probably not a factor in other instances where there is an obviously responsible principal defendant as in *Compania Dominicana de Aviacion*.

Id. at 423.

In *Compania Dominicana de Aviacion v. Knapp*, 251 So. 2d 18 (Fla. 3d Dist. Ct. App. 1971), the court rejected the defendant’s contention that reference made during trial to a collateral settlement by Lloyd’s of London could not be remedied by a curative instruction.

49. 281 So. 2d 499 (Fla. 1973).

50. *Id.* at 501.

51. *Id.* at 502.

52. *See* Brief for American Insurance Association, amicus curiae at 6, *O’Quinn v. Thompson*, No. 52577 (Fla. 1978) (one of three consolidated cases in *Markert v. Johnston*, 367 So. 2d 1003 (Fla. 1978)).

53. *See* Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, (1959), which reports of experiments with juries and insurance.

Where the defendant disclosed that he had no insurance the average award of all verdicts was \$33,000. Where defendant disclosed that he had insurance but there was no objection the average award rose to \$37,000.

hand, evidence also exists indicating that lower awards result when insurance coverage is known by the jurors.⁵⁴ Assuming *arguendo* that juries return higher awards when insurance coverage is known, no evidence exists to determine whether such award is merely adequate rather than excessive.⁵⁵ In other words, whether *justice* or *injustice* is achieved by concealment of liability insurance coverage is an unanswered question.

Realism requires acceptance of the fact that most if not all juries become aware of the defendant's insurance coverage at some point during trial. This is particularly true in automobile litigation where the average juror assumes, rightly or not, that an insurance company will eventually bear the cost of an adverse judgment.⁵⁶ An able plaintiff's

Where, however, the defendant said he had insurance and there was an objection and an instruction to disregard, the average award rose to \$46,000. . . .

Id. at 754. See also Neitzert, *Jury Trials of Insurance Companies and Large Corporations*, 18 CHI. B. REC. 87 (1937).

54. See *Gladewater Laundry & Dry Cleaners v. Newman*, 141 S.W.2d 951 (Tex. Civ. App. 1940)(evidence of insurance policies was introduced in the first trial, and the jury awarded \$7,500. After reversal, in the second trial in which no evidence of insurance was permitted, the jury awarded \$12,000.). See also 8 J. APPLEMAN, *supra* note 11, § 4861, at n.1 ("extensive studies have demonstrated that injection of insurance tends to diminish the size of jury verdicts; and states like Wisconsin which have permitted direct action have lower verdicts than neighboring states not permitting mention of the insurer's presence"); W. PIERSON, *THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS* § 145 at 325 (1956); Note, *Direct Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 HARV. L. REV. 357, 358 n.12 (1960).

55. See Note, *The Liability Insurer as a Real Party in Interest: Proposed Amendments to the Minnesota Rules of Civil Procedure*, 41 MINN. L. REV. 784, 788 n.33 (1957)(Citing a letter from Professor Harry Kalven, Jr., Director of the Jury Study Project, Jan. 8, 1957. In the Chicago Jury Study Project, interviews with experimental jurors indicated the effect of insurance knowledge was to impel rendering of what they thought was an adequate award. The absence of insurance knowledge caused the jurors to award what they considered to be less than adequate.).

56. See *Beta Eta*, 237 So. 2d at 167 (Fla. 1970)(Ervin, C.J., concurring in part and dissenting in part)

The universality of insurance protection explodes the out-moded concept that to avoid prejudice an insured's applicable insurance must be isolated from the jury's knowledge. The feature of insurance has become an integral factor in the modern jury's actual approach to the discharge of its role in assessing personal injury litigation issues, notwithstanding contrary the-

attorney has many "legitimate" ways of indirectly communicating to the jury the existence of insurance.⁵⁷ Therefore, it is submitted that arguments for and against joinder of liability insurers should not be premised upon illusory and theoretical foundations of prejudicial impact on juries.

The Power Behind *Markert v. Johnston*: The Supreme Court's Rulemaking Authority

The Florida Constitution authorizes the supreme court to promulgate rules regulating practice and procedure in all Florida courts.⁵⁸ In 1973, in response to the legislature's enactment of various laws which related to practice and procedure, the court held that the mandate to regulate practice and procedure was an *exclusive* grant to the supreme court.⁵⁹ The legislature may veto or repeal a court rule by a general law enacted by a two-thirds vote in each house of the legislature,⁶⁰ but it may not amend or supersede a rule.⁶¹ If a statute is subsequently

oretical considerations. It is general public knowledge that in a world fraught with personal risks most of our citizens have the protection of insurance.

Accord Schevling v. Johnson, 122 F. Supp. 87, 89 (D. Conn. 1953); *See also* Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 171 (1958); Lassiter, *Direct Actions. . . Against the Insurer*, 1949 INS. L.J. 411, 416.

57. The most widely used method is to examine jurors on *voir dire* regarding their interest in the defendant's insurance company. *See, e.g.*, Ryan v. Noble, 95 Fla. 820, 822, 116 So. 766, 768 (1929); City of Niceville v. Hardy, 160 So. 2d 535, 538 (Fla. 1st Dist. Ct. App. 1964); Purdy v. Gulf Breeze Enters., Inc., 403 So. 2d 1325, 1331 (Fla. 1981) ("Since there is no longer any reason for not mentioning insurance in front of jurors, an attorney may question prospective jurors about any possible prejudice or bias they may have whether it be for or against insurance companies.").

58. The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by a general law enacted by a two-thirds vote of the membership of each house of the legislature. FLA. CONST. art. V, § 2(a).

59. *In re Clarification of Florida Rules of Practice & Procedure*, 281 So. 2d 204, 205 (Fla. 1973).

60. *See supra* note 58.

61. *In re Clarification*, 281 So. 2d at 205.

adopted by the court as a rule of practice and procedure, no attempt by the legislature to amend the statute is valid.⁶² The supreme court has interpreted the last sentence of article V, section 2(a)⁶³ as requiring knowledge and specific intent on the part of each house to override a specific rule.⁶⁴ No such specific intent was evinced in the passage of the Revised Insurance Code. Therefore, the re-enactment of section 627.7262 is not a constitutional repeal of rule 1.210(a).⁶⁵

That neither the constitutional language nor the intent of the framers mandates the court's holding of *exclusive* authority to regulate practice and procedure has been the subject of recent commentary.⁶⁶ Nevertheless, the court remains firmly entrenched in the notion of its exclusive power to promulgate rules of practice and procedure.⁶⁷ Nor is Florida unique in constitutionally granting exclusive power to the supreme court over rules of practice and procedure.⁶⁸

The Boundaries of the Court's Rulemaking Authority

It is fundamental that court rules cannot contravene constitutional provisions, extend or abridge jurisdiction, or abrogate or modify substantive law.⁶⁹

62. *Id.* 1955 Fla. Laws 265, ch. 29737, § 3 similarly provided in part: "When a rule is promulgated and adopted by the supreme court concerning practice and procedure, and it conflicts with the statute, the rule supersedes the statutory provision."

63. FLA. CONST. art. V, § 2(a).

64. *Carter v. Sparkman*, 335 So. 2d 802, 808 (Fla. 1976)(England, J., concurring), *cert. denied*, 429 U.S. 1041 (1977).

65. See *supra* notes 8 & 23 and accompanying text.

66. See Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 U. FLA. L. REV. 442 (1980), for a history of the rulemaking authority and a cogent urging of the abandonment of the idea of exclusivity.

67. See *School Bd. of Broward County v. Surette*, 281 So. 2d 481 (Fla. 1973); *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Avila South Condominium Ass'n v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1977); *Markert v. Johnston*, 367 So. 2d 1003 (Fla. 1978); *Cozine v. Tullo*, 394 So. 2d 115 (1981).

68. See, e.g., ARIZ. CONST. art. VI, § 5; MICH. CONST. art. VI, §§ 4, 5; PA. CONST. art. V, § 10(c). No provision is made in these constitutions for legislative veto or repeal of court promulgated rules.

69. See Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 482, 482 (1940); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623,

The constitutional grant of the court's rulemaking authority is expressed in the terms "practice and procedure."⁷⁰ Since "practice" and "procedure" are generally considered synonymous,⁷¹ the actual distinction is between procedural and substantive law.

Florida has drawn the boundaries, if boundaries are to be drawn, according to the definitions expressed by Justice Adkins:

Practice and procedure pertains to the legal machinery by which substantive law is made effective. . . . [S]ubstantive law creates, defines, adopts and regulates rights, while procedural law prescribes the method of enforcing those rights.

. . . The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.

. . . Practice and procedure encompasses the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.

. . .

. . . The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.⁷²

These broad statements supposedly define the distinction between substance and procedure. Article II, section 3⁷³ expressly restricts the exercise of authority by one branch in areas of power belonging to another. Since the supreme court has exclusive authority over practice and procedure,⁷⁴ the legislature may not enact statutes which are procedural.⁷⁵ If the subject matter is substantive, the legislature may act

634 (1957).

70. See *supra* note 58.

71. *Poyser v. Minors*, 7 Q.B.D. 329, 334 (1881).

72. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972)(Adkins, J., concurring).

73. FLA. CONST. art. II, § 3, *Branches of Government*. See *supra* note 4.

74. See *supra* text accompanying notes 59-62.

75. *Chappell v. Florida Dept. of Health & Rehabilitative Services*, 391 So. 2d

upon it.⁷⁶

Joinder of Liability Insurers: Substantive or Procedural

One *Shingleton* question remains unanswered: whether joinder and nonjoinder of liability insurers is procedural or substantive? The answer is of paramount importance in determining whether the new statute will withstand supreme court scrutiny, as undoubtedly the issue will be decided there.⁷⁷ If joinder of insurers is deemed procedural and in conflict with rule 1.210(a),⁷⁸ the statute will be struck as an invasion of the supreme court's exclusive rulemaking authority.⁷⁹ If joinder (and nonjoinder under the new statute) is deemed to involve substantive rights, the legislature has acted within its authority, and the statute will be held valid.

Unfortunately, when squarely faced with an opportunity to resolve this issue, the court demurred. Instead, the court in *Markert v. Johnston*⁸⁰ decided that resolution of the issue was not essential since the language of the statute provided "rather clearly that joinder of insurers is merely a procedural step in the conduct of a motor vehicle tort lawsuit."⁸¹ The statute before the court⁸² provided for both nonjoinder, at the commencement of the suit, and joinder, at a later stage. Consistent

358 (Fla. 5th Dist. Ct. App. 1980); Military Park Fire Control Tax Dist. No. 4 v. DeMarios, 407 So. 2d 1020, 1021 (Fla. 4th Dist. Ct. App. 1981). See cases cited *supra* note 67.

76. See *supra* note 75.

77. Since the effective date of the re-enactment of the nonjoinder statute, Florida circuit courts have been deluged with defendant liability insurers' motions to dismiss in reliance on the new statute. To the author's knowledge, most courts have denied the motions and concluded that the new statute is unconstitutional under the authority of *Markert v. Johnston*, 367 So. 2d 1003 (Fla. 1978). See, e.g., *Shields v. Richardson*, No. 82-3503-CA (Fla. 4th Cir. Ct. Oct. 8, 1982); *Feldman v. Boyd*, No. 81-5515-CA(L)01-C (Fla. 15th Cir. Ct. Dec. 9, 1982); *Scioli v. McClean Trucking Co.*, No. 82-632 CA-10 (Fla. 15th Cir. Ct. Dec. 29, 1982); *Shurtleff v. Sunstream Equip. Co., Inc.*, No. 82-5578 CA(L)01-K (Fla. 15th Cir. Ct. Jan. 12, 1983); *Moran-Hernandez v. North East Ins. Co.*, No. 82-3455 CA(L)01-B (Fla. 15th Cir. Ct. Jan. 17, 1983).

78. FLA. R. CIV. P. 1.210(a), see *supra* note 23.

79. See FLA. CONST. art. II, § 3, and art. V, § 2(a).

80. 367 So. 2d 1003 (Fla. 1978).

81. *Id.* at 1005.

82. See *supra* note 1.

with *Shingleton*, the insurer would at some point be joined. The statute thus attempted to control the "timing of joinder during the course of a trial, . . . [which] is, without question, a matter of practice or procedure. . . ." ⁸³ However, in his specially concurring opinion advocating adoption of the substance of the invalid statute as a court rule, Justice Alderman indicated that joinder or nonjoinder, not merely timing of joinder, of insurers is procedural. ⁸⁴

Two years later, in *Cozine v. Tullo*, ⁸⁵ the court again faced the issue with an equivalent statute prohibiting joinder of all liability insurers. ⁸⁶ Similarly begging the substantive-procedural question, the majority held the statute unconstitutional "[f]or the reasons expressed in *Markert v. Johnston*. . . ." ⁸⁷ In his dissent, Justice McDonald expressed the view that neither section 627.7262(1) ⁸⁸ nor section 768.045 ⁸⁹ was entirely procedural so as to encroach upon the court's exclusive domain. In concluding that "substantive rights are affected by the nonjoinder statutes," ⁹⁰ he relied upon specific language in *Shingleton*, ⁹¹ and the fact that the insurance industry and the plaintiffs' bar show such opposing interests in the joinder issue. This "fact" is undoubtedly correct. However, such reasoning does not compel the conclusion that nonjoinder statutes are substantive rather than procedural.

83. *Markert*, 367 So. 2d at 1006.

84. *Id.* See also, *Piccolo v. Hertz Corp.*, 421 So. 2d 535, 536 (Fla. 1st Dist. Ct. App. 1982) ("The question of joinder is different from the question of whether a suit may be maintained in the first place; the former is procedural, whereas the latter is substantive.")

85. 394 So. 2d 115 (Fla. 1981).

86. FLA. STAT. § 768.045 (1977). The principal difference from section 627.7262 (1977) was the inclusion of "liability" in the title, and the exclusion of "motor vehicle" in the first sentence.

87. 394 So. 2d at 115 (1981).

88. FLA. STAT. § 627.7262 (1977).

89. FLA. STAT. § 768.045 (1977).

90. *Cozine*, 394 So. 2d at 116.

91. [U]nless the legislature in the exercise of its police power regulation of insurance, affirmatively gives insurers the substantive right to insert "no joinder" clauses in liability policies there is no basis in law for insurers to assume they have such contractual rights as a special privilege not granted other citizens to contract immunity with their insureds from being sued as joint defendants by strangers.

Id. (quoting *Shingleton*, 223 So. 2d at 718-19 (Fla. 1969)).

The fact that the joinder issue is considered crucial does not render it substantive. Furthermore, the *Shingleton* logic supports the conclusion that there was no alteration of substantive law.⁹²

The court's refusal to resolve the substantive-procedural controversy involved in nonjoinder statutes impels extraction of its views on the issue from other cases. Virtually all of these decisions rely on principles announced in *Shingleton*.

The *Beta Eta* decision shed the first light on the substantive-procedural issue. By affirming the decision of the first district,⁹³ the supreme court impliedly accepted the statement that the *Shingleton* decisions "were not intended to nor do they have the effect of changing the substantive law of this state. These decisions have merely created a *procedural innovation* which permits a direct action against a liability insurance carrier as a codefendant in a suit brought against its insured. . . ."⁹⁴ Since the supreme court modified the district court's decision on the severance issue,⁹⁵ a debatable question existed as to the supreme court's approval of the district court's statement that the *substantive* law of Florida prohibits any reference at trial to the defendant's insurance coverage. (Joinder of the insurer necessarily involves reference at trial to the defendant's insurance coverage).

The next venture into the "twilight zone" of substance and procedure as it relates to joinder of insurers was in *School Board of Broward County v. Surette*.⁹⁶ At issue was section 455.06(2), Florida Statutes,⁹⁷ which dealt with the liability and insurance of local governmental units. Pursuant to the statute, a condition precedent to automatic partial waiver of governmental immunity was that no attempt to suggest the existence of insurance be made at trial. The su-

92. See *Shingleton*, 223 So. 2d at 718. The case was based primarily upon the joinder provisions of 1.210(a) of the Florida Rules of Civil Procedure. See *supra* note 23 and accompanying text.

93. *Beta Eta House Corp., Inc. of Tallahassee v. Gregory*, 230 So. 2d 495 (Fla. 1st Dist. Ct. App. 1970).

94. *Id.* at 499 (emphasis added). *Accord Durrett v. Davidson*, 239 So. 2d 46, 48 (Fla. 2d Dist. Ct. App. 1970); *Kephart v. Pickens*, 271 So. 2d 163, 164 (Fla. 4th Dist. Ct. App. 1972).

95. See *supra* note 34 and accompanying text.

96. 281 So. 2d 481 (Fla. 1973).

97. FLA. STAT. § 455.06(2)(1977).

preme court agreed this provision was unconstitutional as contrary to article V, section 2(a),⁹⁸ in light of the joinder and severance rules. "This portion of Fla. Stat. § 455.06(2) which provides for severance of a political body's insurer relates to joinder and severance, truly a procedural matter, and is therefore superseded and rendered ineffective. . . ."⁹⁹ Although the invalid portion of the statute referred to *references* to insurance at trial, the court did not discuss any substantive rights, indicating that none was involved. Thus it appeared the *Beta Eta* district court's statements that references to insurance involved substantive law were not accepted by the supreme court.

This became explicitly clear in *Carter v. Sparkman*,¹⁰⁰ where the court confronted another statute prohibiting references to insurance. Section 768.47(1), Florida Statutes,¹⁰¹ prohibited "any reference to insurance, insurance coverage or joinder of an insurer as a codefendant in the suit."¹⁰² The court concluded the legislature intended only to bar "any reference" to joinder of insurers rather than joinder itself.¹⁰³ Furthermore, the court held that "references" to insurance or insurance companies during the course of a trial "is a purely procedural matter having to do with the conduct of trial proceedings. To the extent the Legislature has attempted to control 'references' during the course of trial . . . it has acted beyond its power."¹⁰⁴

In *School Board of Broward County v. Price*,¹⁰⁵ the court stated

98. FLA. STAT. art V, § 2(a).

99. *Surette*, 281 So. 2d at 483.

100. 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

101. FLA. STAT. § 768.47(1)(1977), formerly FLA. STAT. § 768.134(1)(1975), enacted as part of the Medical Malpractice Reform Act of 1975.

102. FLA. STAT. § 768.47(1), formerly FLA. STAT. § 768.134(1).

103. *Carter v. Sparkman*, 335 So. 2d 802, 806 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977). The court could have addressed the substantive-procedural aspect of joinder here too.

104. *Id.* at 806(Fla. 1976)(footnote omitted). In view of the legislature's special finding of a "crisis" in skyrocketing medical malpractice premiums (Preamble to ch. 75-9, 1975 Fla. Laws 15), the court adopted the substance of the "reference" provision as rule 1.450(c) of the Florida Rules of Civil Procedure. Adoption of a nonjoinder rule was unsuccessfully urged upon the *Markert* court. *See* Brief for Respondent at 14, *Markert v. Johnston*, 367 So. 2d 1003 (1978).

105. 362 So. 2d 1337 (Fla. 1978).

specifically it was receding from the *Surette*¹⁰⁶ holding. Section 230.23(9)(d)(2), Florida Statutes,¹⁰⁷ contains a provision substantially identical to the statute in *Surette* and conditions waiver of governmental immunity upon no suggestion at trial of the existence of insurance. Adhering to the precedent of *Surette*,¹⁰⁸ *Sparkman*,¹⁰⁹ and *Godshall*,¹¹⁰ the Fourth District Court of Appeal concluded the statute was unconstitutional. In its reversal, the supreme court distinguished the *Sparkman* statute since it was “part of an enactment, under the Legislature’s police power, to meet a public health crisis in Florida. The prohibition of insurance references at trial, although undoubtedly designed to reduce the crisis, was clearly not part of any substantive right.”¹¹¹ Furthermore, the statute at issue in *Price* waives sovereign immunity for school boards. This is specifically within the constitutional power of the legislature.¹¹² The prohibition of the statute “sets the bounds of the substantive right to sue a political subdivision of the State.”¹¹³ Thus, the legislature’s constitutional authority to waive sovereign immunity and its implicit power to condition the waiver “saved” the statute by injecting substantive rights.¹¹⁴

Although not involving insurance companies, *Avila South Condominium Association, Inc. v. Kappa Corp.*,¹¹⁵ also sheds light on the court’s views of substance and procedure. The court held that the legislative attempt to confer standing on a condominium association to bring a class action on behalf of its members was an impermissible violation of article V, section 2(a). Citing Justice Adkin’s standard for

106. 281 So. 2d 481 (Fla. 1973).

107. FLA. STAT. § 230.23(9)(2) (1979).

108. 281 So. 2d 481.

109. 335 So. 2d 802.

110. *Godshall v. Unigard Ins. Co.*, 281 So. 2d 499 (Fla. 1973).

111. *Price*, 362 So. 2d at 1339.

112. FLA. CONST. art. X, § 13 authorizes the legislature to enact provisions for bringing suit against the state.

113. *Price*, 362 So. 2d at 1339.

114. The court “excused” the incompatible *Surette* decision because it didn’t appear that this constitutional argument had been advanced before the *Surette* court. On the contrary, this argument was cogently urged upon the court. *See* Reply Brief for Petitioner at 3-5, and Brief for Amicus Curiae at 4, *School Bd. of Broward County v. Surette*, 281 So. 2d 481 (Fla. 1973).

115. 347 So. 2d 599 (Fla. 1977).

distinguishing between substance and procedure,¹¹⁶ the court concluded that “[e]ssentially the statutory sections seek to define the proper parties in suits litigating substantive rights. Clearly this has to do with ‘the machinery of the judicial process as opposed to the product thereof.’”¹¹⁷

These decisions indicate the court continues to adhere to “strict” substantive-procedural definitions. The fact that a rule of procedure may reflect prevailing public policy does not enable the legislature to invade the court’s rulemaking authority.¹¹⁸ The court has specifically stated that joinder is truly a procedural matter,¹¹⁹ that references at trial to insurance coverage is clearly not part of any substantive right,¹²⁰ and that the determination of proper parties in suits litigating substantive rights is a procedural matter.¹²¹

The New Statute - Section 627.7262

The new section was “substantially reworded to permit insurers to insert non-joinder clauses in their contracts.”¹²² Subsection (1) states, in essence, that a plaintiff may not sue a liability insurer until a judgment first has been obtained against the insured for a cause of action covered by the policy. Subsection (2) provides that no person shall be considered a third party beneficiary under a liability insurance policy until a judgment first has been obtained against the insured for a cause of action covered by the policy. Subsection (3) “affirmatively” grants to insurers the “substantive” right to include provisions in policies which preclude a noninsured person from filing an action against the insurer until a judgment first has been obtained against the insured for a cause

116. See *supra* text accompanying note 72.

117. 347 So. 2d at 608. Observing that “the peculiar features of condominium development, ownership, and operation indicate the wisdom of providing a procedural vehicle for settlement of disputes affecting condominium owners, . . .” the court adopted the substance of the stricken statute as Rule 1.220 of the Florida Rules of Civil Procedure. *Id.*

118. See *Markert*, 367 So. 2d at 1005, n.8.

119. See *supra* text accompanying note 104.

120. See *supra* text accompanying note 111.

121. See *supra* text accompanying note 117.

122. STAFF REPORT, *supra* note 8, at 92.

of action which is covered by the policy.¹²³

Subsections (1) and (2) are in direct opposition to *Shingleton* principles. The *Shingleton* court viewed the injured party's cause of action against the insurer as vesting in or accruing at the same time the party becomes entitled to sue the insured.¹²⁴ Thus, initial joinder was permissible. Subsection (2) is an attempt to abrogate the third party beneficiary principles first articulated in *Shingleton*. As previously discussed,¹²⁵ *Shingleton* and *Beta Eta* established that liability insurance is secured with the intent to benefit injured third parties. Based on this doctrine, joinder of liability insurers was permissible.

At first blush, subsection (3) appears to receive support from *Shingleton*. The *Shingleton* court noted that the joinder rule "raises the presumption that unless the Legislature in the exercise of its police power regulation of insurance, affirmatively gives insurers the substantive right to insert 'no joinder' clauses in liability policies there is no basis in law for insurers to assume they have such contractual right. . . ."¹²⁶ However, much of the opinion indicates that the legislature cannot constitutionally grant such right to the insurance companies. In striking these no joinder clauses, the court relied upon the Flor-

123. By use of the terminology "for a cause of action which is covered by such policy," the statute should have no effect on an injured person's right to bring a direct action against the insurer for recovery of judgment in excess of policy limits, based on alleged fraud or bad faith of insurer in conduct or handling of suit. *See, e.g.*, *Thompson v. Commercial Union Ins. Co. of New York*, 250 So. 2d 259 (Fla. 1971); *Boston Old Colony Ins. Co. v. Gutierrez*, 388 So. 2d 54 (Fla. 1980), *cert. denied*, 450 U.S. 922 (1981); *Travelers Ins. Co. v. Perez*, 384 So. 2d 971 (Fla. 3d Dist. Ct. App. 1980).

124. *Shingleton*, 223 So. 2d at 716. *Accord* *Travelers Ins. Co. v. Perez*, 384 So. 2d 971, 973 (Fla. 3d Dist. Ct. App. 1980). *But cf.* *Davis v. Williams* 239 So. 2d 593, 595 (Fla. 1st Dist. Ct. App. 1970) and *Clemons v. Flagler Hosp., Inc.*, 385 So. 2d 1134, 1135-36 (Fla. 5th Dist. Ct. App. 1980) (for statute of limitations purposes, the injured party's cause of action against the insurer does not accrue until entry of judgment against the tortfeasor).

125. *See supra* notes 19-20 and accompanying text.

126. *Shingleton*, 223 So. 2d at 718-19 (Fla. 1969). *But see* J. Drew's dissenting opinion at page 722 ("The majority opinion, in relying solely upon Rule 1.210. . . and our rule-making power under the Constitution for the conclusion there reached necessarily holds that the Legislature is wholly devoid of power to enact laws prohibiting joinder of insurance companies as parties defendant under the circumstances presented in this case.").

ida Constitution's guarantee of access to the courts.¹²⁷ Furthermore, in discussing the procedural effects of these clauses, whereby a plaintiff would have to first recover a judgment against the tortfeasor and then file another action against the insurance company to enforce the judgment, the court stated:

The unfettered right of a plaintiff to sue defendants jointly is so universal and essential to *due process* that it can rarely be curtailed or restricted by private contract between potential defendants.

. . . It is an anomaly in the law and discriminatory for parties to a contract to attempt to deny nonconsenting members of the public a full, complete, adequate remedy at law which is *constitutionally* guaranteed all citizens.

. . . [I]t seems anomalous to public policy to procedurally sanction and condone a situation where the ultimate beneficiary of policy proceeds is deprived by a provision in the policy of an open, speedy and realistic opportunity to pursue by due process his right of an adequate remedy at law jointly against the insured and insurer.¹²⁸

The constitutional overtones are clear. If due process is violated by the insertion of nonjoinder clauses in insurance policies, the fact that the legislature grants the power to do so does not eliminate the violation. In other words, the legislature has no more authority to violate due process than have insurance companies.¹²⁹

127. *Id.* at 718. ("The insured and the insurer cannot constitutionally contract away or postpone the speedy and adequate remedy the law affords a third party, nor impose unusual limitations upon the latter's right to jointly sue adverse parties.").

128. *Shingleton*, 223 So. 2d at 717-19 (emphasis added).

129. If a law is passed by unanimous legislature, clamoured for by the general voice of the public, and a cause is before [a judge] on it, in which the whole community is on one side and an individual nameless or odious on the other, and he believe it to be against the constitution, he must so declare it, — or there is no judge.

Brief for Respondent at 5, *O'Quinn v. Thompson*, 367 So. 2d 1003 (Fla. 1978) (consolidated case in *Markert*) (quoting address of Attorney General Rufus Choate, given before the Constitutional Convention of 1853).

Conclusion

Most likely the court will scrutinize the new statute to determine whether it is substantive or procedural. Although the word “nonjoinder” has been excluded from the *text* of the statute,¹³⁰ the effect of the new statute is identical to that of the old statute: to prohibit initial joinder of the insurer by making a judgment against the insured a condition precedent to maintenance of a cause of action against the insurer. As such, the legislature has again attempted to prescribe the timing of joinder. The supreme court has clearly held that any such attempt is an unconstitutional usurpation by the legislature of the judicial function. The new statute, like the old, will not withstand judicial scrutiny on this point.

Liability insurers control the litigation, choose the attorneys, defend the case, and have a direct financial interest in the outcome. The Florida judiciary has recognized that realism dictates continued acknowledgement of liability insurers as real parties in interest in actions to determine the insured’s liability. Keeping this reality in mind, the court should directly address the substantive-procedural issue and make a definitive statement. Since *Shingleton*, the court has not expressed a clear policy, and in fact has gone to great lengths to avoid the issue. Should the court determine the new statute substantive rather than procedural, the due process issues expressed in *Shingleton* surely deserve further attention — much more than the court has been willing to give.

Ilene D. Napp

130. The statute is still entitled “*Nonjoinder of Insurers*”. FLA. CONST. art. III, § 6 requires the text of a statute to come within the scope of its title.

Entrapment: A Review of the Principles of Law Governing This Defense as Applied by the Eleventh Circuit Court of Appeals

Certain types of criminal activity are consensual and covert. Hence they are virtually undetectable without the use of a government agent or informer. Narcotics peddlers, brokers of counterfeit currency . . . all do business clandestinely. Their crimes are likely to go unchecked unless the government can itself approach a suspect to offer him the opportunity to commit a crime and thus give evidence of his guilt.¹

Introduction

A sentiment clearly evinced by the Fifth and Eleventh Circuit Courts of Appeals is that informants and undercover government agents are necessary to combat crime.² The use of these methods by law enforcement agencies has caused an outcry from criminal defendants and their attorneys.³ The cry "I was entrapped" has become quite commonplace, and thus a popular avenue of defense. However, the general principles of law regarding the defense of entrapment are multi-faceted. The purpose of this note is to review those principles as they have been applied by the recently organized Eleventh Circuit and its progenitor, the former Fifth Circuit.⁴

Burdens of Proof

The entrapment defense was first recognized by the United States

1. *Pierce v. United States*, 414 F.2d 163, 165 (5th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

2. *United States v. Tobias*, 662 F.2d 381, 385 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2908 (1982).

3. See Winter, *Probing the Probers, Does Abscam Go Too Far?* 68 A.B.A. J. 1347 (1982).

4. The Eleventh Circuit in the case *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), adopted as precedent the decisions of the former Fifth Circuit handed down prior to the close of the business day September 30, 1981.

Supreme Court in *Sorrells v. United States*.⁵ The Court has since re-stated that entrapment occurs “when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.”⁶ Thus, the central theme of the entrapment defense is that the individual lacked the predisposition to commit the crime.⁷

Since entrapment is an affirmative defense, the defendant must present some initial evidence before the issue is properly raised.⁸ Although the Fifth Circuit employed various formulations of the defendant’s burden of production in *United States v. Hill*,⁹ the Eleventh Circuit has arrived at a definitive standard:

If there is any evidence in the record that, if believed by the jury, would show that the government’s conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it, then, as in all other cases, involving questions of guilt or innocence, the jury must be permitted to resolve the matter.¹⁰

5. 287 U.S. 435 (1932).

6. *United States v. Branca*, 677 F.2d 59, 61 (11th Cir. 1982) (quoting *Sorrells v. United States*, 287 U.S. 435, 442 (1932)).

7. *United States v. Bagnell*, 679 F.2d 826, 834 (11th Cir. 1982). *See also* *United States v. Humphrey*, 670 F.2d 153, 155 (11th Cir. 1982); *United States v. Webster*, 649 F.2d 346, 348 (5th Cir. 1981) (en banc).

8. *See Humphrey*, 670 F.2d at 155; *Tobias*, 662 F.2d at 384.

9. 626 F.2d 1301, 1303 n.3 (5th Cir. 1980), the court noted that the different constructions of the defendant’s burden of production had not lead to dissimilar results. They settled with the *Pierce* formulation, while inviting comparisons of the various tests. *Compare e.g.*, *United States v. Wolffs*, 594 F.2d 77, 80 (5th Cir. 1979) (“defendant must adduce some evidence, more than a scintilla, which tends to show government inducement and lack of predisposition”), *with* *United States v. Timberlake*, 559 F.2d 1375, 1379 (5th Cir. 1977) (defendant must submit entrapment theory “for which there is any foundation in the evidence”), *and with* *United States v. Gomez-Rojas*, 507 F.2d 1213, 1218 (5th Cir. 1975), *cert. denied*, 423 U.S. 826 (1975) (defendant must present “a prima facie case of entrapment indicating the government created a ‘substantial risk that the offense would be committed by a person other than one ready to commit it’”).

10. *Humphrey*, 670 F.2d at 155 (originally enunciated by the Fifth Circuit in *Pierce*, 414 F.2d at 168).

This standard requires the defendant come forward with evidence showing the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it.¹¹ Whether the defendant's evidence is sufficient to meet this burden of production is a question of law for the court.¹² Former Fifth Circuit opinions appear to only require some evidence of government inducement. In *Hill*, however, the Fifth Circuit Court made clear that "a reading of those cases reveal[ed] that 'inducement' represent[ed] more than mere suggestion, solicitation, or initiation of contact and, in fact, embodies an element of persuasion or mild coercion functionally equivalent to that denoted in the *Pierce* formulation. . . ."¹³ To raise entrapment, a defendant must, therefore, prove more than that the government solicited him or provided the opportunity for the crime.¹⁴ He must show "mild persuasion or coercion"¹⁵ by the government. Evidence from the government's case in chief may be sufficient to raise the issue.¹⁶ Once the defendant has sustained this burden, the issue of entrapment becomes a question of fact for the jury.¹⁷

11. The Eleventh Circuit recalled the comparisons made by the *Hill* court, and similarly adopted the "substantial risk" formulation of *Pierce* in *Humphrey*, 670 F.2d at 155.

12. *United States v. Tate*, 554 F.2d 1341, 1344 (5th Cir. 1977).

13. 626 F.2d at 1304. Also, in *Hill* the court invited perusal of prior cases in which defendants had submitted evidence of government inducement. These cases included *United States v. Hammond*, 598 F.2d 1008, 1011 (5th Cir. 1979) (testimony indicated that the government had thought of a scheme, attempted to "push" it on defendant, and that defendant had not favorably received the government plan); *Timberlake*, 559 F.2d at 1379 (numerous attempts at setting up illicit deals had failed and witness testified that on at least one occasion defendant had directly rejected government entreaty); *United States v. Costello*, 483 F.2d 1366, 1367-68 (5th Cir. 1973) (upholding trial court's refusal to submit entrapment question, finding no "inducement" where there was no evidence of persuasion or coercion, even though government agent proposed the illicit transaction to the defendant).

14. 679 F.2d at 835. See also *Tobias*, 662 F.2d at 384 (citing *United States v. Dickens*, 524 F.2d 441 (5th Cir. 1975), cert. denied, 425 U.S. 994 (1976)): "A prosecution cannot be defeated merely because a government has provided the accused with the opportunity or the facilities for the commission of the crime."

15. *Bagnell*, 679 F.2d at 835.

16. *United States v. Reyes*, 645 F.2d 285 (5th Cir. 1981). Accord *Hill*, 626 F.2d 1301, and *Pierce*, 414 F.2d 163.

17. *United States v. Groessel*, 440 F.2d 602 (5th Cir. 1971).

After having satisfied the burden of production, the burden of persuasion will then be on the government to prove that the defendant was predisposed to commit the charged offense beyond a reasonable doubt.¹⁸ The government must show that the defendant was ready and willing without persuasion to commit the offense and that the government merely provided a propitious opportunity.¹⁹

In addition, the law of the Eleventh Circuit requires that the defendant admit the acts charged against him when he pleads entrapment.²⁰ The rationale for this rule is based on the fact that it would be inconsistent to deny the very acts upon which the prosecution is predicated at the same time as pleading the defense of entrapment, which assumes that acts charged were committed.²¹

Predisposition

"The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police of-

18. *Humphrey*, 670 F.2d at 155.

19. *See Wolffs*, 594 F.2d at 80; *United States v. Benavidez*, 558 F.2d 308, 310 (5th Cir. 1977); *United States v. Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1952)(Hand, J.).

20. *See United States v. Vadino*, 680 F.2d 1329 (11th Cir. 1982) and *United States v. Nicoll*, 664 F.2d 1308 (5th Cir. 1982). This premise has been hotly debated throughout the circuits. *Compare United States v. Greenfield*, 554 F.2d 179 (5th Cir. 1977), with *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975)(en banc) (both cases allowed defendant to both deny wrongdoing and plead entrapment). A narrow exception to this rule was articulated in *Sears v. United States*, 343 F.2d 139, 143-44 (5th Cir. 1965). The court held that a defendant may argue simultaneously that he was entrapped to commit the overt acts charged in the indictment but was not a member of the conspiracy. This holding, however, is limited to the situation where the government's own case in chief injects substantial evidence to support a theory of entrapment. In this event the defense is raised by a motion of acquittal and by a requested jury instruction in which the government must still prove beyond a reasonable doubt defendant's guilt of the act charged. For a discussion of this debate see note, *Denial of the Crime and the Availability of the Entrapment Defense in the Federal Courts*, 22 B.C.L. REV. 911 (1981).

21. *United States v. Williamson*, 482 F.2d 508, 513 (5th Cir. 1973).

ficer.”²² Nevertheless, the fact that government agents merely afford opportunity for the commission of an offense does not constitute entrapment: “[T]o determine whether entrapment has been established a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.”²³ The defendant’s lack of predisposition to commit the crime is the principal element of the entrapment defense.²⁴

Evidence Admissible to Prove Predisposition

The United States Supreme Court has enunciated a number of elements which can be considered in determining whether a defendant was a person “otherwise innocent”²⁵ in whom the government had implanted the criminal design. These elements were more distinctly stated by the Ninth Circuit in *United States v. Reynoso Ulloa*.²⁶

1. The character of the defendant including any previous criminal activity.
2. Whether the suggestion to engage in criminal activity originated with the government.
3. Whether defendant sought financial profit from the criminal activity.
4. Whether there is evidence of reluctance on the part of the defendant to proceed with the offense.
5. Whether the government induced the defendant to act by repetitive persuasion.
6. The nature of the government’s inducement or persuasion.²⁷

The United States Supreme Court has found evidence of a reluctance to engage in criminal activity which was overcome by repeated government inducement to be highly significant.²⁸

22. *Sherman v. United States*, 356 U.S. 369, 372 (1958).

23. *Id.* at 372.

24. *United States v. Russell*, 411 U.S. 423 (1973).

25. *Sherman*, 356 U.S. at 372.

26. 548 F.2d 1329, 1336 (9th Cir.), *cert. denied*, 436 U.S. 926 (1977).

27. *Id.* at 1336. However, fact number two does not prove entrapment since mere solicitation is insufficient. See *Lopez v. United States*, 373 U.S. 427 (1963).

28. See, e.g., *Sherman*, 356 U.S. at 373 (one request by government was not enough, “additional ones were necessary to overcome, first petitioners refusal, then his evasiveness, and then his hesitancy . . .”); *Sorrells*, 287 U.S. 436 (The government

By raising a defense of entrapment, the defendant opens himself up to a "searching inquiry into his own conduct and predisposition."²⁹ Evidence of the defendant's prior similar acts is essential to the question of predisposition, and under Federal Rule of Evidence 404(b) evidence of prior convictions are admissible to prove predisposition.³⁰ The government, however, is not restricted to only introducing past crimes to prove predisposition. A defendant's use of drugs may be effective to establish a predisposition to deal in narcotics when he is charged with an offense of this nature.³¹ In addition, the defendant's own statements may provide evidence of his predisposition. In *United States v. Jenkins*,³² the court found that the defendant's post-crime statement ("if you need more, I'll be there"³³) constituted sufficient evidence to permit the trier of fact to infer a prior willingness to commit a narcotics offense. It is important to note, however that the government may not introduce out-of-court statements about the defendant's reputation for criminal conduct as evidence of predisposition.³⁴

agent asked for liquor and was twice refused, but the agent persisted in soliciting the defendant and taking advantage of sentiment aroused by conversation about their service together as companions in World War I.).

29. *Sorrells*, 287 U.S. at 451.

30. Federal Rule of Evidence 404(b) states:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.

31. *United States v. Smith*, 407 F.2d 202 (5th Cir. 1969). It is also significant to note that testimony concerning a defendant's drug use at the time of the crime would have been admissible to establish the *res gestae*. See *United States v. McDaniel*, 574 F.2d 1224, 1227 (5th Cir. 1978).

32. 480 F.2d 1198, 1200 (5th Cir. 1973).

33. *Id.* at 1200.

34. See *United States v. Webster*, 649 F.2d 346, 347 (5th Cir. 1981)(en banc), where the court held that "only in special circumstances may the government prove what its agents have been told about the defendant as evidence of good faith, reasonableness or proper motive of the government and then only to rebut contrary assertions by the defendant." In *Webster*, the defendant was charged with possessing and distributing cocaine. The defendant's defense was entrapment. He tried to prove that his illegal acts were precipitated by the incessant urgings of a female informant. To rebut this claim that the defendant was just an "innocent dupe," a Drug Enforcement Administration Agent testified for the prosecution that a few months before the arrest he had

Once a defendant makes it clear that his defense is entrapment, there is nothing to prevent the prosecution from going forward with its evidence on predisposition. Thus, the prosecution need not wait until rebuttal to introduce predisposition evidence, but may do so in its case in chief. In *United States v. Vendetti*,³⁵ after the defendant raised the entrapment defense in his opening statement, the government presented its evidence of predisposition during its case in chief. The defendant attacked this order of proof in his appeal. The court responded: "No cases are cited, nor can be found which require the prosecutor to wait until a defendant has fully developed his proof before presenting evidence on predisposition."³⁶

Entrapment as a Matter of Law

Many defendants have argued entrapment as a matter of law relying upon *United States v. Bueno*.³⁷ In *Bueno*, the facts gave rise to what later has been called a "full circle" transaction³⁸ in which a government agent supplied drugs to the defendant for sale to another government agent.³⁹ This type of transaction is distinguished from the more common one, where the defendant procures the narcotics from a private source. However this case and others like it, which have found entrapment as a matter of law, have been undermined, if not rejected entirely.⁴⁰ The United States Supreme Court, in *Hampton v. United*

been told by a reliable informant that he had purchased cocaine from the defendant on several occasions. The trial court had allowed this testimony because prior to *Webster* the Fifth Circuit had permitted the prosecution to introduce both hearsay and double-level hearsay as a means of proving the defendant's predisposition. This evidence was permitted through the character/reputation provisions of the Federal Rules of Evidence 404(a)(1), 405 and 803(21) collectively). In striking down this practice the *Webster* court adamantly asserted: "predisposition is a state of mind, not a character trait." 649 F.2d at 350.

35. No. 7805668, slip op. at 1 (5th Cir. Apr. 24, 1979).

36. *Id.* at 2. In addition, the procedure under attack was followed and approved in *Rocha v. United States*, 401 F.2d 529, 530 (5th Cir. 1968), *cert. denied*, 393 U.S. 1103 (1969).

37. 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973).

38. *See United States v. Evers*, 552 F.2d 1119, 1122 (5th Cir. 1977), *reh'g denied*, 556 F.2d 579 (5th Cir. 1977), *cert. denied*, 434 U.S. 929 (1977).

39. *Id.*

40. *Id.* The court intimated that the *Bueno* defense had become obsolete in the

States,⁴¹ indicated that not even a “full circle” transaction was entrapment “per se”. This is because the primary focus of the entrapment defense is not on what acts the government agents committed, but rather on whether the defendant was predisposed to commit the offense.⁴² If the defendant was willing to commit the act, no entrapment occurs regardless of surrounding circumstances.

Governmental Misconduct and Overreaching

The governmental misconduct defense, also available to defendants and often employed in tandem with entrapment, is based on principles of due process and the supervisory powers of the court. While the entrapment defense requires the court to focus on predisposition of the defendant to commit the crime, the United States Supreme Court has established that, for cases involving alleged governmental misconduct, the focus of the court’s inquiry shall be directed solely toward the government’s conduct.⁴³ Often cited by defendants in support of this defense is the following statement from *United States v. Russell*:⁴⁴ “[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. . . .”⁴⁵ This was the type of defense employed in *Rochin v. California*.⁴⁶ In *Rochin*, the United States Supreme Court found that the record revealed “a shocking series of violations of constitutional rights.”⁴⁷ In that case, deputy sheriffs illegally broke into

wake of *Hampton v. United States*, 425 U.S. 484 (1976) and *United States v. Russell*, 411 U.S. 423 (1973). In *United States v. Graves*, 556 F.2d 1319 (5th 1977), *reh’g denied*, 562 F.2d 1257, (1977) *cert. denied*, 435 U.S. 923 (1978), the court stated “whatever the fate of *Bueno*, it is now clear that the expression ‘entrapment as a matter of law’, has become a misnomer with respect to predisposed defendants.” *Id.* at 1324.

41. 425 U.S. at 489-90.

42. Whether the defense is designed to deter objectionable police conduct or to protect “otherwise innocent” defendants is discussed in Note, *Entrapment: A Source of Continuing Confusion in the Lower Courts*, 5 AM. J. TRIAL AD. 293 (1981).

43. *Hampton*, 425 U.S. at 490.

44. *United States v. Russell*, 411 U.S. 423 (1973).

45. *Id.* at 431-32.

46. 342 U.S. 164 (1952).

47. *Id.* at 172.

Rochin's home and forcibly attempted to extract capsules which Rochin had ingested. At the hospital, the deputy sheriffs directed a doctor to "pump" Rochin's stomach in order to obtain two morphine capsules. The Court found this was conduct that "shocks the conscience"⁴⁸ and offends even those with hardened sensibilities, constituting methods "too close to the rack and screw."⁴⁹ Both the *Hampton* and *Rochin* decisions indicate the defense is intended to embody only profoundly outrageous and shocking conduct which violate the defendant's constitutional rights.⁵⁰

While the Court in those cases stated they cannot condone police activity as employed in *Rochin*, the Supreme Court asserted that it will not allow defendants to raise "defenses" which in essence, would give the federal judiciary an absolute veto right over law enforcement practices.⁵¹

Use of Confidential Informants

An issue often appearing in relation to government conduct is the government's use of confidential informants.⁵² Defendants frequently rely on *Williamson v. United States*.⁵³ In *Williamson*, a Fifth Circuit case, an informer was hired by a government agent to procure evidence against persons known by the agent to be involved in an illicit whiskey business. The informer would be rewarded predetermined sums upon

48. *Id.*

49. *Id.*

50. Due process considerations are given excellent treatment in Note, *Entrapment as a Due Process Defense: Developments After Hampton v. United States* 57 IND. L.J. (1982) and Abramson & Lindeman, *Entrapment and Due Process in the Federal Courts*, 8 AM. J. CRIM. LAW 139 (1980).

51. *Hampton*, 425 U.S. at 490. See also *United States v. Tobias*, 662 F.2d 381 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2908 (1982), which sets the "outer limits to which the government may go in the quest to ferret out and prosecute crimes in this circuit," *id.* at 387, without violating due process notions. (D.E.A. established a chemical supply plant, placed an advertisement in *High Times Magazine* offering chemicals and laboratory equipment, set-up and advised the defendant how to manufacture Phencyclidine (P.C.P.)).

52. For a discussion on how law enforcement agencies are using unsuspecting middlemen to, in effect, destroy the entrapment defense, see Note, *Entrapment Through Unsuspecting Middlemen*, 95 HARV. L. REV. 1122 (1982).

53. 311 F.2d 441 (5th Cir. 1962), *cert. denied*, 381 U.S. 950 (1965).

conviction of several specified individuals. The informant made the transaction for which the defendants were convicted. However, the record lacked evidence to indicate the agents had sufficient knowledge of defendant's involvement in the illicit whiskey trade to justify contracting on a contingent fee basis to obtain legally admissible evidence. Further, the record did not show whether the agents carefully instructed the informer on the rules of entrapment. Under these circumstances, the court held that it could not sanction the contingent fee arrangement.

The Fifth Circuit, however, declined to extend *Williamson* to other contingency fee arrangements.⁵⁴ The court, in *United States v. McClure*,⁵⁵ listed the following factors for taking a case out of the domain of *Williamson*: (1) the possibility that the informant was instructed in the law of entrapment,⁵⁶ (2) that the agent and not the informant made the purchase⁵⁷ and (3) prior to employing the informant, the agent did not know the defendant.⁵⁸ Additionally, in *United States v. Edwards*,⁵⁹ the court held that *Williamson* would not be useful to defendants where the informant had been given a subsistence allowance, with a later reward following conviction, so long as he was not given a specific sum to convict a particular person.

Jury Instructions

The defendant must show "mild persuasion or coercion"⁶⁰ on the

54. See, e.g., *United States v. Jenkins*, 480 F.2d 1198 (5th Cir. 1973), *cert. denied*, 414 U.S. 913 (1973) (where the Court refused to apply *Williamson* to a case in which no specific arrangement for payment existed, no particular person was the target of the effort to buy, and in which the purchase was made by the government agent, not the informer); *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976) (the court held that the fact that an informant was paid on a contingent fee basis for making a case did not make it entrapment).

55. 546 F.2d 670 (5th Cir. 1977).

56. *Id.* at 673. See also *United States v. Garcia* 528 F.2d 580 (5th Cir. 1976), *cert. denied*, 429 U.S. 898 (1976).

57. *McClure*, 546 F.2d at 673. See also *Jenkins*, 480 F.2d 1198.

58. *McClure*, 546 F.2d at 674. See also *United States v. Joseph*, 533 F.2d 282 (5th Cir. 1976), *cert. denied*, 431 U.S. 905 (1977).

59. 549 F.2d 362 (5th Cir. 1977).

60. *United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982).

part of the government before he is entitled to an entrapment instruction.⁶¹ While evidence from the government's case in chief may be sufficient to raise the issue of entrapment,⁶² the entrapment issue need not be presented to the jury if the evidence does not sufficiently raise the issue.⁶³ The United States Supreme Court stated in *Lopez v. United States*:⁶⁴ "Indeed the paucity of the showing [of entrapment] might well have justified a refusal to instruct the jury at all on entrapment."⁶⁵ *United States v. Pierce*⁶⁶ enunciated the Eleventh Circuit's policy on the instruction: "If the record as a whole is devoid of such [entrapment] evidence, astute defense counsel may not invite confusion of the jury by seeking charges on this or any other problem not presented by the case before the court."⁶⁷ Nevertheless, failure to give an instruction when the defendant has met his burden is reversible error.⁶⁸ The instruction should state that the government has the burden of proof beyond a reasonable doubt to show the defendant was predisposed to commit the crime.⁶⁹

Conclusion

Entrapment has been employed to defend those charged with crimes ranging from counterfeiting to illegally shipping obscene materials. Most frequently it has been relied upon to defend those charged with crimes involving the purchase of narcotics. This defense is most

61. *Id.* at 835 (only showing made was government made initial contact).

62. *United States v. Reyes*, 645 F.2d 285 (5th Cir. 1981). *Accord* *United States v. Hill*, 626 F.2d 1301 (5th Cir. 1980); *Pierce v. United States*, 414 F.2d 163 (5th Cir. 1969).

63. *Pierce*, 414 F.2d at 167.

64. 373 U.S. 427 (1963).

65. *Id.* at 436.

66. 414 F.2d 163 (5th Cir. 1969).

67. *Id.* at 168.

68. *Bagnell*, 679 F.2d at 835.

69. However, it is *not* reversible error if the jury charge fails to unequivocally state that the government had the burden of proving beyond a reasonable doubt that the defendant was not entrapped so long as the court has given a general instruction on the burden of proof and has told the jury to consider the charge as a whole. *United States v. Sonntag*, 684 F.2d 781 (11th Cir. 1982); *United States v. Vadino*, 680 F.2d 1329 (11th Cir. 1982); *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979).

appropriate when the defendant has been apprehended because of evidence developed by undercover police officers and confidential informants.

However, the entrapment defense often has been misapplied and misunderstood. Prosecutors and defense counsel alike must be alert to its subtleties for there are traps which lie in wait for the unwary practitioner.

David M. Lazarus

Federal Judges' Absolute Immunity from Criminal Prosecution Prior to Impeachment: *U.S. v. Hastings*

I. INTRODUCTION

On January 19, 1983, in Miami's federal courthouse, opening statements began in the criminal trial of Federal Judge Alcee L. Hastings, United States District Judge for the Southern District of Florida. Judge Hastings had been indicted for bribery. Prior to the commencement of this criminal trial, Judge Hastings instituted a constitutional challenge to the criminal justice system. Judge Hastings is the first federal judge in United States history to claim that an active federal judge is immune from criminal prosecution prior to impeachment by Congress.

The major issue throughout this monumental case is best stated by the Roman philosopher, Juvenal: "Quis quatodiet ipsos custodes, or, who is to judge the judges[?]"¹ This article will focus on the decision issued by the Eleventh Circuit Court of Appeals.² The position taken in this paper is not designed to address the merits of the criminal trial. Nor is this article to be construed as to imply the guilt or innocence of Judge Hastings but rather to examine the narrow procedural issues discussed in the decision by the Eleventh Circuit Court of Appeals.

1. Thompson & Pollitt, *Impeachment of Federal Judges—An Historical Overview*, 49 N.C.L. REV. 87, 87 (1970).

2. The first issue in *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), whether the court of appeals has jurisdiction over the interlocutory appeal, will not be discussed in this article. The Eleventh Circuit held that they had jurisdiction because the issue was collateral in that it could not be effectively reviewed from a final judgment. See *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Abney v. United States*, 431 U.S. 651 (1977); *United States v. Brizendine*, 659 F.2d 215 (D.C. Cir. 1981); *United States v. Dunbar*, 611 F.2d 985 (5th Cir. 1980); *United States v. Myers*, 635 F.2d 932 (2d Cir. 1980), *cert. denied*, 449 U.S. 956 (1980); 28 U.S.C. § 1254(c) (1976); 28 U.S.C. § 1291 (1976).

II. INDICTMENT

On December 29, 1981, a federal grand jury, in the Southern District of Florida, returned a four count indictment against Federal Judge Alcee L. Hastings and William A. Borders, Jr. Mr. Borders, allegedly became involved with Judge Hastings when an undercover agent, posing as a defendant in one of Hastings' cases (*United States v. Romano*)³ approached Borders to set up a bribe. Other than this connection, Mr. Borders had not been involved in any way with this case. Hastings, a federal judge since November 30, 1979, was charged with offenses in two counts of the indictment.⁴

The first count charged Judge Hastings with "conspiracy to solicit and accept money in return for unlawful influence in performance of lawful governmental functions in violation of 18 U.S.C. § 371."⁵ The indictment charged that Judge Hastings and Mr. Borders solicited and accepted a bribe from an undercover agent posing as a defendant in *Romano*. Specifically, Hastings was alleged to have agreed to reduce the defendant's prison sentence and to revoke an order which required the defendant to forfeit certain property in return for \$150,000.⁶

3. 523 F. Supp. 1209 (S.D. Fla. 1981).

4. Counts III and IV of the indictment charged only Borders with traveling in interstate commerce in furtherance of bribery in violation of 18 U.S.C. § 1952 (1976). After a change of venue to the Northern District of Georgia, Borders was convicted by a jury on all four counts on May 7, 1982. He has appealed the conviction.

5. *United States v. Hastings*, 681 F.2d 706, 707 n.2 (1982). 18 U.S.C. § 371 (1976) provides in full:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

However, in the Brief for Appellant the Hon. Alcee L. Hastings at 3, *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982) [hereinafter cited as *Hastings Brief*] the charge stated that he "had been *influenced* in making a judicial decision by the promise of a bribe. (R. 1-5)." (emphasis added).

6. *Hastings*, 681 F.2d at 707.

The second count charged Hastings "with corruptly impeding due administration of justice in violation of 18 U.S.C. § 12 and § 1503."⁷ The indictment alleged that Hastings obstructed the due administration of justice by disclosing to Borders the substance of the unissued order in *Romano*. The acts alleged would have involved the exercise of Hastings' judicial authority.

Hastings' first argument was made in the motion to quash the indictments. He claimed that a federal district court does not have jurisdiction over the criminal prosecution of an active federal judge prior to removal from office. This motion was denied by the district court. However, on appeal, a stay was granted by the Eleventh Circuit Court of Appeals⁸ until they reviewed and affirmed the district court's decision

7. *Hastings*, 681 F.2d at 707 n.2.

18 U.S.C. § 12 (1976) provides in full:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1503 (1976) provides in full:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, magistrate, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, . . . or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the *due administration of justice*, shall be fined not more than \$5000 or imprisoned not more than five years, or both.

(emphasis added).

8. Historically, when a criminal action was brought against a federal judge, prior to impeachment, the House of Representatives stayed its hand until the criminal pro-

rejecting Hastings' argument. As a result of the Eleventh Circuit's decision, the criminal trial commenced on January 19, 1983, prior to the initiation of any impeachment proceeding.

III. HASTINGS' THREE ARGUMENTS

A. Textual Reading of Article I, Section 3, Clause 7 of United States Constitution

Hastings raised three major issues on appeal. The first argument was that a literal reading of Article I, Section 3, Clause 7 of the United States Constitution⁹ mandated a sequence of impeachment prior to criminal prosecution. This granted Congress the exclusive power to remove a federal judge. Through the use of the maxim, *Expressio unius exclusio est alterius*, a federal judge has an absolute right not to be tried in federal court unless and until he is impeached and convicted (removed) by Congress.¹⁰ The explicit language in the Constitution precludes the existence of concurrent power to prosecute unlawful acts of a federal judge. Hastings argued that through the indictment the executive branch has "chose[n] to bypass the judicial mechanisms Congress created."¹¹

B. Separation of Powers Doctrine

Hastings' primary argument was that the separation of powers doctrine is designed to prevent one branch of government from encroaching on the powers of the other branches of government. Congress

ceedings were adjudicated. See Brief for Appellee United States of America at 40, *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982) [hereinafter cited as *United States Brief*]. Never has a judge, after conviction of an impeachable crime, remained in office. *Id.*

9. U.S. CONST. art. I, § 3, cl. 7 states:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

10. *United States Brief*, *supra* note 8, at 17.

11. *Hastings Brief*, *supra* note 5, at 48.

is explicitly given the power to cut across the lines fixed by the separation of powers doctrine through the impeachment provision in the Constitution. The separation of powers doctrine stands in the way of any legislative removal of executive and judicial officers except as such removal is expressly authorized in the impeachment provision.

C. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

Hastings' final argument was that the creation of The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980¹² (hereinafter referred to as the Judicial Conduct Act of 1980) reaffirmed his argument that impeachment was the exclusive form of removal for a federal judge.¹³ Through this act "Congress expressly retained and asserted the exclusivity of its removal power."¹⁴

IV. GOVERNMENT'S RESPONSE

A. Interpretation of Article I, Section 3, Clause 7 of United States Constitution

The government maintained that in Article I, Section 3, Clause 7 the framers of the Constitution explicitly provided for the *procedural* rights of an accused during the impeachment process.¹⁵ This clause was not intended to prevent criminal prosecutions of federal judges' unlaw-

12. 28 U.S.C. § 372 (Supp. IV 1980).

13. Act of April 30, 1790, ch. 9 § 21, 1st Cong., 2d Sess., 1 Stat. 117 (1845). Hastings also examined the Act of 1790 created by the First Congress. The pertinent part of the statute stated that a federal judge convicted of bribery "shall forever be disqualified to hold any office of honour, trust or profit under the United States." *Id.* Hastings argued that this statute did not specify if criminal prosecution was to precede removal. The government countered that the Act of 1790 would be superfluous unless criminal prosecution took place prior to impeachment because a judge convicted in an impeachment proceeding would already be removed from office and thereby disqualified from holding the position. United States Brief, *supra* note 8, at 27. This statute indicates that Congress anticipated trials for bribery prior to the initiation of impeachment proceedings.

14. Hastings Brief, *supra* note 5, at 25.

15. *Hastings*, 681 F.2d at 710.

ful acts.¹⁶ Article I, Section 3, Clause 7 clarifies the rights of civil officers, which includes judges, and was not intended to limit the jurisdiction of Article III courts.¹⁷ It does not establish a mandatory sequence between these two *independent* processes.¹⁸ Instead the purpose behind Article I, Section 3, Clause 7 was twofold: 1) to distinguish impeachment from English Common Law where criminal sanctions (severe penalties such as death) could be imposed on an impeached judge and 2) to anticipate the question concerning double jeopardy and to avoid this claim if the criminal trial is subsequent to the impeachment proceedings.¹⁹

B. Separation of Powers Doctrine

Although impeachment is the only explicit method of removal provided in the Constitution, the government contended that it was not necessarily intended to be the exclusive remedy for reprimanding a federal judge. Nothing in the text of the Constitution either explicitly or implicitly exempts judges from federal prosecution.²⁰ If the drafters intended judicial immunity for judges from criminal prosecution, they would have explicitly provided for it in the Constitution.

The government took the non-exclusivist position created by Shartel²¹ and later expanded by Raoul Berger.²² According to this position, impeachment is not the exclusive means of reprimanding a federal judge.

The government in analyzing the separation of powers doctrine argument examined the several Constitutional Conventions. None of the remarks made in these Constitutional Conventions suggested that judges were to be immune from traditional judicial controls.²³ Rather

16. United States Brief, *supra* note 8, at 16-17.

17. *Hastings*, 681 F.2d at 710.

18. United States Brief, *supra* note 8, at 23.

19. *Id.* at 21-23.

20. *Id.* at 17.

21. Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870 (1930).

22. Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475 (1970).

23. *Id.* at 1503.

Congress' jurisdiction is to be concurrent and not exclusive.²⁴

A criminal conviction prior to impeachment does not violate the separation of powers doctrine because "whatever immunities or privileges the Constitution confers for the purpose of assuring the independence of co-equal branches of government they do not exempt the members of those branches 'from the operation of the ordinary criminal law.'"²⁵ Criminal conduct is not to be protected by the separation of powers doctrine because criminal acts are not within the necessary functions to be performed by public officials. The executive branch would not be intruding upon the judicial branch if the act was outside the scope of the judge's office.²⁶ In *United States v. Nixon*,²⁷ the Supreme Court held that the separate powers allocated to each branch of government was not intended to operate with absolute independence.

C. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

An analysis of the Judicial Conduct Act of 1980²⁸ reveals that it does not deal with criminal prosecution of federal judges. The Judicial Conduct Act of 1980 "establishes a mechanism within the judiciary for processing and remedying complaints against federal judges arising from their mental or physical disability or conduct prejudicial to the effective administration of justice."²⁹

The Judicial Conduct Act of 1980 is based "on the premise that

24. Shartel, *supra* note 21, at 894.

25. *United States v. Isaacs*, 493 F.2d 1124, 1144 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974).

26. *United States Brief*, *supra* note 8, at 23-24.

27. 418 U.S. 683, 707 (1974).

28. 28 U.S.C. § 372 (Supp. IV 1980). Complaints of senility or physical disability of a federal judge do not give rise to an impeachable or indictable offense. This was the gap that Congress remedied through the enactment of the Judicial Conduct Act of 1980. Under the Judicial Conduct Act of 1980, federal judges who are senile or ill have their cases assigned to another federal judge.

When a judge is impeached and found guilty, he is denied his salary, tenure, pension and removed from office, whereas, when a judge's cases are assigned to another judge he retains his office and his salary.

29. *United States Brief*, *supra* note 8, at 36-37.

the judiciary is subject to controls other than impeachment.”³⁰ During the hearings on the Act, the Honorable Elmo B. Hunter, a United States District Court judge for the Western District of Missouri, commented that “[w]e need not discuss criminal conduct as such. Federal and state criminal statutes apply to every federal judge just as they apply to any other citizen.”³¹

Even though both briefs set forth extensive arguments concerning this Act, the Eleventh Circuit in *Hastings* stated in a footnote that *Hastings*’ argument was totally devoid of merit.³²

V. THE BASIS FOR THE ELEVENTH CIRCUIT COURT OF APPEALS DECISION

A. History of Impeachment

In reaching its decision, the Eleventh Circuit Court examined the history of impeachment as it related to prior cases involving federal judges.³³ Through the impeachment provisions of the Constitution, Congress was given the explicit power to ensure that the federal judges

30. *Id.* at 37 n.23.

31. *Id.* at 38. In addition, a similar remark was made by Representative Kastenmeier; “Nothing in the legislation precludes a complainant from bringing any matter to the attention of the House of Representatives for an impeachment inquiry *or* to the U.S. Department of Justice for a criminal investigation.” United States Brief, *supra* note 8, at 39 n.24 (quoting 126 CONG. REC. H8785 (daily ed. Sept. 15, 1980)).

32. *Hastings*, 681 F.2d at 712 n.20.

33. 1929—Francis Winslow—Judge in Southern District of New York. Judge Francis Winslow resigned before his criminal trial commenced and on the day impeachment proceedings were to begin in the House of Representatives.

1940—Martin Manton—Second Circuit Judge. Resigned during his criminal trial. Ultimately tried and convicted. *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939).

1941—John Warren Davis—Judge in the Third Circuit Court of Appeals. He was indicted and while remaining in office was a defendant in two criminal trials. The jury could not reach a verdict in either case and the indictments were dismissed. Before impeachment proceedings began, he resigned from office.

For a discussion of the proceedings concerning these three federal judges see J. BORKIN, *THE CORRUPT JUDGE* (1962); Thompson & Pollitt, *supra* note 1, at 108; Ferrick, *Impeaching Federal Judges: A Study Of The Constitutional Provisions*, 39 *FORDHAM L. REV.* 1, 25 (1970).

act within their judicial capacity.³⁴ According to the United States Constitution, Congress has the "sole power to impeach"³⁵ "civil officers,"³⁶ including federal judges, for "Treason, Bribery or other high Crimes and Misdemeanors."³⁷ If impeached and convicted by the United States Senate, the judge is removed from office and precluded from holding any office in the United States government.³⁸

B. *United States v. Isaacs*

Until *United States v. Isaacs*,³⁹ in 1974, no one questioned the power of the executive or judicial branch to prosecute federal judges prior to impeachment.⁴⁰ The issue was raised in this case because one of the defendants, Otto Kerner, was a sitting Seventh Circuit federal judge. The Eleventh Circuit relied solely on this case because it was the only decision in the area.

34. Since 1796, the qualifications of at least forty-seven federal judges have been questioned in the House of Representatives. Only nine federal judges have been actually impeached by the House of Representatives. Out of these nine judges, four were acquitted by the Senate, four were convicted and one resigned.

For an extensive history on the impeachment of these nine federal judges, see Ford, *Impeachment—A Mace for the Federal Judiciary*, 46 NOTRE DAME LAW. 669 (1971); Kelley & Wyllie, *The Congressional Impeachment Power as it Relates to the Federal Judiciary*, 46 NOTRE DAME LAW. 678 (1971); Thompson & Pollitt, *supra* note 1.

35. U.S. CONST. art. I, § 3, cl. 7.

U.S. CONST. art. I, § 3, cl. 6 states:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

36. U.S. CONST. art. II, § 4 states:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

37. *Id.*

38. U.S. CONST. art. I, § 3, cl. 7.

39. 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974).

40. In *Isaacs*, Judge Kerner of the Seventh Circuit raised the same argument as Judge Hastings on appeal, but it was denied. Judge Kerner was convicted and resigned prior to being sent to prison.

In *Isaacs*, there were nineteen counts to the indictment,⁴¹ the majority of which related to activities that allegedly took place while Judge Kerner was governor of Illinois and prior to his appointment to the Court of Appeals for the Seventh Circuit. Even though a majority of the charges against Judge Kerner in *Isaacs* did not involve acts within his judicial capacity, the Seventh Circuit, in *dicta*, stated "[t]he Constitution does not forbid the trial of a federal judge for criminal offenses committed either before or *after* the assumption of judicial office."⁴² Thus, if a federal judge can be criminally prosecuted for acts prior to his taking office, *a fortiori*, he can also be subject to criminal liability for acts committed within his judicial office. The Eleventh Circuit in *Hastings*, extended the holding in *Isaacs* and used *Isaacs'* *dicta* to reach the holding in *Hastings*.

C. Immunities

1. Congressmen

The Eleventh Circuit analogized the prosecution of congressmen to the prosecution of federal judges in reaching their decision. Congressmen can be criminally prosecuted prior to expulsion by the House of Representatives.⁴³ There is no indication in the Constitution that judges are to be held to a different standard. A parallel can be drawn between federal judges and congressmen concerning criminal acts of a federal official committed within his official capacity. If the framers of the

41. The major charges were mail fraud, 18 U.S.C. § 1341 (1976); conspiracy, 18 U.S.C. § 1952 (1976); and perjury before a grand jury, 18 U.S.C. § 1623 (1976). All of these charges related to the conspiracy count which involved an Illinois racing operation. The perjury charge was the only activity which took place after Kerner took office as a federal district judge. It is important to note that the perjury charge was in no way connected with Judge Kerner's performance of his judicial duties. Judge Kerner was eventually sentenced to three years in prison and fined \$50,000.

42. *Isaacs*, 493 F.2d at 1142 (emphasis added).

43. A Congressman can argue that he can not be indicted or tried until he is expelled by Congress, because the Constitution explicitly provides for a method of removing him from office. *United States v. Hastings*, 681 F.2d 706, 710 n.10 (11th Cir. 1982). U.S. CONST. art. I § 5, cl. 2.

This argument, which is similar to *Hastings'* argument, has been rejected. *See United States v. Brewster*, 408 U.S. 501 (1972); *Burton v. United States*, 202 U.S. 344 (1906); *United States v. Johnson*, 577 F.2d 1304 (5th Cir. 1978).

Constitution wanted to give judicial immunity to federal judges they would have explicitly provided for it. This argument gains support when viewed in light of the expressed provisions of the *speech and debate clause* for congressmen and the *limited immunity from arrest clause* for congressmen.⁴⁴

2. Judges—Civil Immunity

At common law, judges enjoyed absolute immunity from civil liability for acts committed within their judicial capacity.⁴⁵ However, the immunity does not apply if the act is outside the scope of his judicial capacity.

Judicial immunity is thus neither an absolute nor an unlimited bar to any suit brought against a judge or judicial officer. Common-law immunities extend only so far as the interests of the common good demand protection for the holder of the office from liability from carrying out his official functions. The application of the doctrine

44. U.S. CONST. art. I § 6, cl. 1 states in part:

They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

45. The Civil Immunity doctrine for judges was established in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871).

Even when a judge is accused of acting maliciously and corruptly for the benefit of the public, he is civilly immune. Judges should be at liberty to exercise their own function with independence and without fear of consequences. *See Burton v. United States*, 202 U.S. 344 (1906).

Pierson v. Ray, 386 U.S. 547 (1967), created the well-established doctrine that judges are immune from liability for damages for acts committed within their judicial jurisdiction.

Stump v. Sparkman, 435 U.S. 349 (1978), involved a situation where a judge, without a hearing or notice to a young retarded girl, ordered the girl sterilized. The Supreme Court held that the judge was not civilly liable because he was acting within his judicial capacity.

O'Shea v. Littleton, 414 U.S. 488 (1974), in this case blacks were deprived of due process by a state circuit court judge. In *dicta* the Supreme Court held that no official is granted immunity from criminal prosecution.

See also Imbler v. Pachtman, 424 U.S. 409 (1976).

of judicial immunity is restricted to its single objective of protecting judicial freedom in the process of deciding civil and criminal cases. Where the initiative and independence of the judiciary is not effectively impaired the doctrine of judicial immunity does not hold.⁴⁶

Thus, the judge's cloak of civil immunity does not grant him immunity from criminal prosecution. The criminal statutes, in their application, allow no exceptions.⁴⁷ Blanket immunity has never been extended to any class of citizens or governmental officials with the exception of foreign diplomats.⁴⁸

The absolute immunity from civil liability was not intended to protect the judicial office.⁴⁹ The immunity from civil liability is premised on the balancing of "the public benefit derived from the judicial independence created by the immunity [weighed against] the sacrifice suffered by aggrieved individuals who are deprived of their civil remedies."⁵⁰ If federal judges were granted immunity from criminal acts, it would be a great threat to the public interest.⁵¹ A federal judge should be able to function in his judicial office without fear of retribution for his beliefs or unpopular decisions.⁵² A judge can not be criminally prosecuted for the manner in which he exercises his judicial power.

When a criminal act is involved, there is no balancing of interests. Bribery defeats the purpose of the judicial system. The purpose of the judicial system is to give a person a fair and impartial trial. Criminal laws are a method of vindicating a public interest⁵³ and are dissimilar from civil interests which are private in nature. The judicial system has "never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the

46. *Shore v. Howard*, 414 F. Supp. 379, 385 (N.D. Tex. 1976).

47. United States Brief, *supra* note 8, at 16.

48. *Id.* at 17.

49. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969). See also Kelley & Wyllie, *supra* note 34.

50. *Hastings*, 681 F.2d at 711 n.17.

51. United States Brief, *supra* note 8, at 34 (quoting *Imbler v. Pachtman*, 424 U.S. 409 (1976)).

52. *Stump v. Sparkman*, 435 U.S. 349, 364 (1978).

53. Kelley & Wyllie, *supra* note 34, at 891.

reach of the criminal law.”⁵⁴

VI. IMPEACHMENT VERSUS CRIMINAL PROSECUTION

The impeachment process is a separate and distinct mechanism from the criminal law system.⁵⁵ Historically, the impeachment process was depicted as cumbersome and fraught with political overtones.⁵⁶ Impeachment was not intended to be a substitute for a criminal trial. The criminal trial is broader in scope. The impeachment process is a supplement to the criminal prosecution.⁵⁷ Impeachment “is a proceeding of [an] entirely political nature and relates solely to the accused’s rights to hold civil office, not to the many other rights which are his as a citizen and which protect him in a court of law.”⁵⁸ The impeachment proceeding does not determine guilt as in a criminal trial but rather determines if there has been an abuse of power which in turn makes the judge unfit to hold office.

In addition, the impeachment process lacks many of the procedural safeguards mandatory in a criminal trial. The safeguards in a criminal trial consist of an impartial jury, evidentiary rules, the state carrying the burden of proof beyond a reasonable doubt, and the defendant’s ability to appeal. A charge on the House floor leaves a judge defenseless, whereas in a criminal trial he would be innocent until proven guilty. “[T]he judicial process provides a more appropriate forum for the resolution of guilt or innocence than does the more political impeachment process.”⁵⁹ The Seventh Circuit in *Isaacs* reaffirmed this statement by stating:

[T]he independence of the judiciary is better served when criminal

54. See *supra* note 50 (quoting *Imbler*, 424 U.S. at 428-29).

55. Ford, *supra* note 34 at 670 (1971).

56. *Isaacs*, 493 F.2d at 1144. See Shartel, *supra* note 21, at 872 (1930). See also Brief for Amicus Curiae American Civil Liberties Union—Florida at 2, *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982) [hereinafter cited as Amicus Curiae Brief], which states “The framers deliberately designed a cumbersome impeachment process to ensure that the judiciary would enjoy independence from the other branches of government.

57. Berger, *supra* note 22, at 1490 (1970).

58. Ford, *supra* note 34, at 670.

59. United States Brief, *supra* note 8, at 6.

charges against its members are tried in a court rather than in Congress. With a court trial, a judge is assured of the protections given to all those charged with criminal conduct. The issues [in a criminal prosecution] . . . are subject to the rules of evidence, the presumption of innocence and other safeguards.⁶⁰

There are different sanctions imposed by each process. Impeachment does not impose a penalty, as in a criminal case, on the judge. The purpose of the impeachment provisions in the Constitution is not intended to punish the individual as in a criminal trial, but rather to protect the public and the political office. Thus, there is a distinction between an indictable offense and an impeachable offense.⁶¹

An impeachable offense involves conduct of a judge which is injurious to society due to an abuse of his public office. In this context, a bribery or a conspiracy charge is an act which can be considered both an indictable and an impeachable offense. The former process is a criminal mechanism and the latter is a political mechanism. Due to the inherent political overtones and lack of procedural safeguards, the impeachment process can result in non-removal despite clear guilt, or visa versa.⁶²

VII. PRACTICAL CONSIDERATIONS OF THE *Hastings* DECISION

The Eleventh Circuit did not examine the ramifications of its decision and chose not to address whether or under what circumstances an extended prison sentence might approach in substance a removal from office.⁶³ As previously noted, most judges who have been criminally convicted have resigned prior to the initiation of the impeachment proceedings.⁶⁴ Yet, the problem remains when a judge is criminally convicted and does not resign from office prior to impeachment. With the slow process of impeachment a convicted criminal could technically remain in office until impeached by Congress. Hastings argued that if a federal judge is first criminally convicted, then impeachment will be a

60. *Isaacs*, 493 F.2d at 1144.

61. *Kelley & Wyllie*, *supra* note 34, at 682.

62. United States Brief, *supra* note 8, at 44.

63. *United States v. Hastings*, 681 F.2d 706, 712 n.19 (11th Cir. 1982).

64. *See supra* note 33.

mere formality and have no independent significance.⁶⁵

The American Civil Liberties Union, in its Amicus Curiae brief, argued that even an acquittal of Judge Hastings in the criminal trial would in effect act as a partial removal from office.⁶⁶ This is because Hastings would be compelled to excuse himself whenever the United States is a party.⁶⁷ This would greatly interfere with his judicial duties. "Any interest of the United States not addressed in the impeachment process could be resolved at a later trial, if the judge was removed [first] by the Congress."⁶⁸

The Amicus Curiae brief expressed the fear that a criminal prosecution would induce selective prosecution by the executive branch.⁶⁹ The executive branch may use a criminal prosecution as a mechanism to oust judges who are unfavorable to the United States government. The American Civil Liberties Union characterized Hastings as a liberal judge, a lenient sentencer, and a judge who has ruled against the government on several occasions prior to his indictment.⁷⁰ The District Court in *Hastings* held that the record was absent any evidence to support the allegation that the government's motivation in bringing the criminal charges against Hastings was vindictive or retaliatory in nature.⁷¹

The federal courts adhered to the universal precept:

No man in this country is so high that he is above the law. No

65. Hastings Brief, *supra* note 5, at 43 states: "Although. . . conviction of and imprisonment for criminal abuse of official power does not remove a judge from office, the clear practical effect of a conviction would be removal."

Relating the Supreme Court opinion in *Reid v. Covert*, 354 U.S. 1 (1957), to the *Hastings* case, if Judge Hastings was acquitted, any person tried and convicted before Judge Hastings would have strong grounds upon which to claim that he was denied the due process required by the Constitution. Therefore, taking Hastings' argument one step further, even if a judge is *acquitted* of all charges he still may not be able to carry out his duties as a judge. Hastings Brief, *supra* note 5, at 44 n.23.

66. Amicus Curiae Brief, *supra* note 56, at 11.

67. *Id.* at 11-12.

68. Hastings Brief, *supra* note 5, at 54.

69. Amicus Curiae Brief, *supra* note 56, at 2-3.

70. *National Council of Churches v. Egan*, No. 79-2959 (S.D. Fla. 1979), is an example of a Hastings decision which was against the government. In this case, the government was required to continue to issue work permits for Haitian refugees.

71. *Hastings*, 681 F.2d at 711 n.16.

officer of the law may set that law at a defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.⁷²

V. CONCLUSION

"[O]ur rights are only as secure as our judiciary."⁷³ If immunity from criminal prosecution was granted to federal judges, it would "frustrate the overriding need to detect and eliminate corruption in the judiciary."⁷⁴ This immunity would erode the public's confidence in the judiciary system and in the long run it would weaken the judicial branch. The executive branch has the power, independent of and concurrent with Congress' impeachment power, to criminally prosecute a federal judge. The rights and immunities granted to the federal judges are conferred on the office for the benefit of the people and not for the judge's personal benefit. The judge holds a position of trust and a fiduciary duty to the public. All are expected to conform to the law enacted by Congress. Criminal statutes allow no exceptions.

In *Hastings*, the Eleventh Circuit, following *Isaacs*, held that an active judge, prior to impeachment, could be subject to federal criminal prosecution for acts within the exercise of his judicial authority. The judicial title does not shield its holder from criminal prosecution⁷⁵ unless the act falls within the prescribed common law immunity for judges. Thus, the nature of the judicial office does not raise a judge above the law, but rather holds him to the same legal responsibilities as any other citizen.⁷⁶

72. *United States v. Lee*, 106 U.S. 196, 220 (1882).

73. *Amicus Curiae Brief*, *supra* note 56, at 14.

74. *United States Brief*, *supra* note 8, at 6.

75. *Braatelen v. United States*, 147 F.2d 888, 895 (8th Cir. 1945). Mr. Braatelen (defendant) was a Conciliation Commissioner who was administering the Frazier-Lemke Act. He was found guilty of conspiracy to defraud the United States by corruptly administering the Frazier-Lemke Act.

76. Prior to the publication of this article, on February 4, 1983, Judge Hastings

Prior to the publication of this article Judge Hastings was acquitted of all charges in the criminal trial. This vindication supports the position taken in this paper. The system functioned properly and enables the public to continue their trust in both Judge Hastings and in the judicial system.

In addition, at the publication of this article, Judge Hastings was under investigation by a special five judge committee due to a misconduct complaint filed under a 1980 law.⁷⁷ This panel will report to the councils of judges governing the Eleventh Circuit. The 1980 law prohibits disclosure of the investigation and as a result the nature of the investigation is not clear.

Victoria Santoro

was found not guilty of all criminal charges.

77. The Miami Herald, Apr. 21, 1983, § D, at 1.

Apparent Authority and Antitrust Liability: An Incompatible Combination? *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation*

Introduction

A "new vicarious antitrust liability doctrine"¹ has emerged from a recent Supreme Court decision² that combines the agency concept of apparent authority with civil antitrust liability.³ *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* for the first time,⁴ permits an agent acting against the interests of his principal but with apparent authority⁵ to subject the principal to antitrust law's punitive treble damages.⁶ Even outside the antitrust arena, punitive damages

1. Howe & Badger, *The Antitrust Challenge to Non-Profit Certification Organizations: Conflicts of Interest and a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, 60 WASH. U.L.Q. 357, 361 (1982).

2. *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 102 S. Ct. 1935 (1982).

3. See generally Appleson, *Errant Volunteers Put Associations In Peril*, 68 A.B.A. J. 796 (1982).

4. 102 S. Ct. at 1950 (Powell, J., dissenting).

5. "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestation to such third persons." RESTATEMENT (SECOND) OF AGENCY § 8 (1957).

For other definitions of apparent authority see W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* §§ 8D, 18B, 22 (1964); H. REUSHLIN & W. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* § 23 (1979); *infra* notes 54-57 and accompanying text.

6. The Clayton Act § 4, 15 U.S.C. 15 (1976) provides for treble damages in Sherman Act § 1 and other antitrust violations and is as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the

were not imposed when apparent agency served as the basis of the principal's liability.⁷ On its journey to this land of expanded antitrust liability, the High Court picked up an unsuspecting passenger.⁸ A nonprofit organization fell victim to these untried extremes of agency and antitrust liability, and for the first time was hit with the sanction of treble damages.⁹

In *Hydrolevel*, the distension of these areas of liability was discreetly masked in Justice Blackmun's majority opinion but partially unveiled by Justice Powell in a vigorous dissent.¹⁰ This comment examines *Hydrolevel's* unclear path of vicarious antitrust liability and the Court's explication of the principles involved in its decision.

American Society of Mechanical Engineers v. Hydrolevel Corp.

Background

The American Society of Mechanical Engineers (ASME) is one of the oldest and largest scientific societies in the United States.¹¹ It is a nonprofit, tax-exempt¹² organization with more than "90,000 members drawn from all fields of mechanical engineering."¹³ ASME's primary

cost of suit, including a reasonable attorney's fee.

7. See *infra* notes 79-87 and accompanying text.

8. See generally Young, *Court Widens Treble Damage Liability For Non-Profit Societies*, 68 A.B.A. J. 846 (1982).

9. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), allowed the application of antitrust laws to nonprofit organizations but *Goldfarb* called for flexibility in imposing sanctions on such organizations. *Id.* at 788 n.17. *Hydrolevel* is the first case imposing the treble damages sanction upon a nonprofit entity. 102 S. Ct. at 1949 n.2, 1950.

10. In the 6-3 decision five justices supported the expansion of antitrust liability in an apparent agency context. Chief Justice Burger rejected the majorities' new vicarious liability approach but concurred in the judgment by utilizing the agency doctrine of ratification. 102 S. Ct. at 1948. The ratification doctrine imposes liability on the principal only after he expressly or impliedly condones the agent's activities. *Id.* Justices White and Rehnquist joined in the dissent. *Id.* at 1949.

11. For a general historical overview of ASME see B. SINCLAIR, *A CENTENNIAL HISTORY OF THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, 1880 - 1980* (Univ. of Toronto Press 1980).

12. I.R.C. § 501(c)(3) (1954) - As a "corporation . . . or foundation organized and operated exclusively for religious, charitable, scientific testing for public safety, literary, or educational purposes. . . ."

13. 102 S. Ct. at 1938.

function is drafting, publishing and interpreting more than 400 separate codes for the industry.¹⁴ Thousands of ASME volunteers participate on the committees and subcommittees overseeing this process.¹⁵ Two ASME volunteers, acting against the organization's interests, fraudulently interpreted a single provision in an 18,000 page code¹⁶ and thereby subjected ASME to antitrust law's treble damages and a \$7.5 million verdict at trial.¹⁷

One of the volunteers, John James, served as vice-chairman of the ASME subcommittee responsible for drafting and interpreting the code section governing fuel safety devices in boilers. James concurrently served as vice-president of McDonnell and Miller¹⁸ (M&M), the dominant force in the fuel safety device market for more than fifty years.¹⁹ The other ASME volunteer, Subcommittee Chairman T. R. Hardin, was executive vice-president of Hartford Steam Boiler Inspection and Insurance Company, the nation's leading underwriter of boiler insurance.²⁰

14. In theory ASME codes are merely advisory and not binding on anyone. However, in practice the codes are highly influential and a manufacturer whose product cannot satisfy the applicable ASME code is at a great disadvantage in the marketplace. 102 S. Ct. at 1938.

ASME codes are incorporated by reference into regulations on the federal, state and local levels and in all but one of the provinces of Canada. *Id.*

15. *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, 635 F.2d 118, 121 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982).

16. ASME's Boiler and Pressure Vessel Code was the subject of the *Hydrolevel* litigation. ASME receives 20,000 - 30,000 inquiries a year seeking its interpretation. 102 S. Ct. at 1949.

17. The District Court's finding of liability was affirmed, but a new trial for damages was ordered by the circuit court because the method utilized for assessing and trebling damages was incorrect. 635 F.2d at 128.

18. It was common for ASME committee members to be employed by business entities directly affected by the ASME codes. The conflicts of interest that arose did not serve as a pretext for ASME's liability in *Hydrolevel*. Arguably, they could.

19. M & M annually controlled more than 85% of the \$10 million market for boiler fuel safety devices. Meyer, *Knocking the Competition — How Rivals' Use of "Industry Code" Report Created Problems for a Tiny Company*, Wall St. J., July 9, 1974, at 36, col. 1.

20. Plaintiff's First Amended Antitrust Complaint at 3, *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, No. 75 Civ. 1360 (E.D.N.Y. December 4, 1978).

International Telephone and Telegraph (ITT)²¹ purchased M&M in 1971. ITT acquired a controlling interest in Hartford Steam in 1970.²² Capitalizing on their positions as chairman and vice-chairman of the ASME boiler subcommittee, ITT's agents, Hardin and James, without ASME's knowledge or possible benefit, conspired to destroy M&M/ITT's newest competitor, the Hydrolevel Corporation.

ASME's procedure for dealing with public inquiries regarding the ASME codes granted a high level of discretion to highly placed officials such as Hardin and James.²³ Hardin as subcommittee chairman had the authority to personally interpret the ASME code in response to a public inquiry merely by terming the response an "unofficial communication."²⁴ The "unofficial" response then bypassed full subcommittee review and was mailed out to the inquiring party.²⁵ This ASME procedure served as the mechanism by which ITT and its agents, Hardin and James, were able to ruin the Hydrolevel Corporation.²⁶

Soon after Hydrolevel lured a major customer away from M&M, James, other M&M officials and Hardin met to plan a course of action. The ASME committeemen drafted a letter for M&M asking ASME if Hydrolevel's new fuel safety device with a time delay satisfied the Boiler Code.²⁷ After receiving the inquiry, ASME referred it to sub-

21. "ITT is a diversified company with subsidiaries and divisions located throughout the United States and the world." When this suit arose ITT had annual sales in excess of \$5 billion. *Id.*

22. In 1970, ITT acquired 99% of the outstanding stock in Hartford Fire Insurance Corp., a Connecticut corporation which owned approximately 11% of the outstanding common stock in Hartford Steam. *Id.*

23. 102 S. Ct. at 1939, 1940.

24. *Id.*

25. *Id.*

26. The ease with which an ASME agent could manipulate this procedure to accomplish bad faith objectives suggests the direct fault of ASME for failing to guard against such misconduct. However, instead of simply premising ASME's liability on some fault of the organization, the appellate court and the Supreme Court, for the first time, founded antitrust liability upon a no-fault apparent authority theory, i.e. even if ASME did everything possible to prevent misconduct by its officials and was blameless in its own right, liability would exist solely because of the agency status of the wrongdoers, which created the appearance of actual authority. *See supra* note 5.

27. 102 S. Ct. at 1939. Both M & M and Hydrolevel manufactured products that automatically cut off the fuel supply to the boiler before the water level became dangerously low. Hydrolevel's new device included a time-delay designed to prevent

committee chairman Hardin for a reply. Hardin and James then drafted a response to their own inquiry which cast doubt upon the safety of Hydrolevel's product.²⁸

As planned, M&M/ITT seized upon this fraudulent interpretation of the code to disparage Hydrolevel's product. M&M/ITT saturated the marketplace with anti-time-delay propaganda informing prospective purchasers that Hydrolevel's device failed to meet ASME standards.²⁹

Hydrolevel, although unaware of M&M/ITT's scheme, learned of the incorrect ASME code interpretation and demanded that ASME send corrections to those who received the faulty information.³⁰ Three months later ASME mailed Hydrolevel a letter that "confirmed the intent" of part of the faulty code interpretation letter but, in effect, admitted that the Hydrolevel product did not violate the code.³¹ Following an investigation into the faulty code interpretation, ASME, still believing in the good faith of Hardin and James' acts, concluded that its officials had acted properly.³² Ultimately, the ITT scheme against Hydrolevel was uncovered by a Senate subcommittee.³³ However, the aspersions cast upon the time-delay device by M&M/ITT were never fully extracted from the minds of a wary buying public.³⁴ Hydrolevel brought an antitrust action against M&M/ITT, Hartford Steam and ASME and in 1979 sold all assets except the lawsuit for a salvage price

premature fuel cut offs. The device allowed the fuel supply to continue for a short time when the overall water level was safe but occasionally fell below the minimum acceptable level because of surging water inside the boiler. *Id.* at 1939 n.1.

28. The reply letter said in part, "If a time delay feature were incorporated in a low water fuel cut-off, there would be no positive assurance that the boiler water would not fall to a dangerous point during a time delay period." 635 F.2d 122.

29. M & M included a copy of the fraudulent reply letter in a booklet entitled "The Opposition - Who They Are, How To Beat Them." The booklet, distributed to M & M salesmen, stated, "A time delay of any kind would very definitely be against the ASME code. . . . [T]his should definitely be brought to the attention of anyone considering the device. . . ." 635 F.2d at 123.

30. 102 S. Ct. at 1940.

31. ASME stated, "[T]here is no intent in Section IV to prohibit the use of low water fuel cut-offs having time delays. . . ." 635 F.2d 123.

32. 102 S. Ct. at 1941.

33. *Id.*

34. See Wall St. J., July 9, 1974, at 36, col. 1.

of \$86,000.

Action in the District Court

In 1979, a jury in federal district court held ASME liable for anti-trust damages of \$7.5 million, three times the actual damages suffered by Hydrolevel.³⁵ Hydrolevel requested a jury instruction permitting apparent authority as a basis of liability but the trial judge rejected such an approach.³⁶ Instead, since the scheme against Hydrolevel was outside the scope of employment of the ASME officials, the jury was told to find ASME liable only if the organization was at fault by ratifying or adopting as its own the misconduct of Hardin and James.³⁷ Judge Weinstein charged:

If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation, and this action was not ratified or adopted by the defendant, ASME, their misconduct cannot be con-

35. *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, No. 75 Civ. 1360 (E.D.N.Y. 1978). ASME was held liable under section 1 of the Sherman Antitrust Act, 15 U.S.C. § (1976).

Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court. *Id.*

See *supra* note 6, the Clayton Act § 4 allowing a private right of action for treble damages.

In stark contrast to the large trial court judgment assessed against ASME, the ITT owned instigators and beneficiaries of the scheme to destroy Hydrolevel, M & M and Hartford Steam, settled out of court for \$725,000 and \$75,000 respectively. 102 S. Ct. at 1945 n.1.

The Second Circuit Court of Appeals affirmed the trial court's imposition of liability against ASME but ordered a new trial on damages. 635 F.2d 118, 131.

36. 635 F.2d at 124. For definitions of apparent authority see *supra* note 5.

37. 102 S. Ct. at 1941. See also *id.* at 1948 (Burger, J., concurring).

sidered that of the corporation with which they are associated.³⁸

Based on this instruction, the jury found ASME at fault and therefore, liable for treble damages.

The Second Circuit and the Supreme Court Adopt a New Theory of Liability

To hold ASME liable, the appellate court and the Supreme Court needed only to affirm the jury's finding of liability which was based on traditional antitrust-agency concepts.³⁹ *Instead, both courts disregarded the jury finding of fault and imputed liability to ASME based on a new no fault vicarious antitrust liability doctrine.*⁴⁰ ASME was held to be a vicarious coconspirator to an unreasonable restraint of trade solely because the misconduct of ITT's agents appeared to be authorized by ASME.⁴¹

Justice Powell argues in the dissent that:

[T]he very facts of this case belie the necessity of simply *creating* a new theory of liability; the jury found ASME liable not upon a theory of apparent authority but upon the traditional basis of ratification or authorization. The apparent authority rationale was not even argued to the Second Circuit on appeal. The Second Circuit, and now this Court, reach out unnecessarily to embrace a dubious new doctrine. That the Court chooses the case of a nonprofit, tax-exempt organization to announce its new rule is particularly inappropriate.⁴²

The circuit court did not explain the benefit produced by the decision to promulgate this new vicarious antitrust liability doctrine when the defendant's liability was already decided on traditional antitrust

38. *Id.* at 1941.

39. *See id.* at 1951, 1955.

40. 635 F.2d at 124.

41. *Id.* at 127. "For ASME to be held liable, then, Hydrolevel had to demonstrate only that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted to benefit ASME or that ASME later ratified their actions." *Id.* The court also characterized ASME's involvement in the scheme as "unintentional participation." *Id.* at 131.

42. 102 S. Ct. at 1951.

grounds. For potential antitrust defendants, “as well as ASME, the approach adopted by the Second Circuit [and the Supreme Court] can be viewed only as a tragic and confusing chapter in antitrust history.”⁴³

The Supreme Court Opinion

In affirming ASME’s liability for the unauthorized actions of the nonprofit organization’s agents, the Supreme Court, for the first time, holds that apparent authority can serve as an appropriate basis for imputing antitrust liability.⁴⁴ Justice Blackmun, writing for the Court, adheres to much of the Second Circuit’s logic and continually focuses upon the possible anticompetitive effects from standard-setting organizations such as ASME.⁴⁵

While *Hydrolevel* involves many agency and antitrust principles, the majority primarily emphasizes antitrust law’s purpose of deterring anticompetitive activities.⁴⁶ Arguably, in doing so, the Court fails to reconcile the new no fault doctrine with well-established rules of antitrust and agency law that disallow imputation of antitrust liability to a principal who is not at fault and does not stand to benefit from the agent’s misconduct.⁴⁷ Justice Blackmun partially concedes that his po-

43. *Howe & Badger*, *supra* note 1, at 387.

[T]he Second Circuit proceeded to adopt a vicarious antitrust liability principle and apparent authority agency standard by which it upheld the antitrust liability of ASME for the misconduct of its two members. This approach, however, was totally unrealistic because it completely begged the question of how, . . . ASME might have avoided a finding of conspiratorial intent. *Id.*

44. 102 S. Ct. at 1944, 1949, 1950.

45. *E.g.*, 102 S. Ct. at 1942 (“ASME wields great power in the nations economy. Its codes and standards influence the policies of numerous states and cities. . . . ASME permits its agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace.”) *Id.* at 1944; (“A standard-setting organization like ASME can be rife with opportunities for anticompetitive activity.”) *Id.* at 1945; (“The anticompetitive practices of ASME’s agents are repugnant to the antitrust laws. . . .”) *Id.* at 1946; (“ASME’s agents . . . are able to affect the lives of large numbers of people and the competitive fortunes of businesses throughout the country. . . . We thus make it less likely that competitive challenges like *Hydrolevel* will be hindered by agents or organizations like ASME in the future.”) *Id.* at 1948.

46. *Id.*

47. *See infra* notes 60-67 and accompanying text. The author does not assert

sition as to the use of apparent authority in antitrust actions is not supported by precedent.⁴⁸ However, he follows the lead of the circuit court by analogizing the antitrust action to a common law suit for fraud or misrepresentation where apparent authority is permitted as an exception to the conventional tort doctrine that disallows its use.⁴⁹

The Court quickly disposes of several other agency arguments by asserting that its decision will “help ensure that standard-setting organizations will act with care when permitting their agents to speak for them.”⁵⁰ However, *ASME’s lack of due care is not an issue under the apparent authority doctrine* and arguably the Court attempts to strengthen its argument by mixing the no fault apparent authority doctrine with a direct negligence or ratification theory requiring fault. Since the Court states that apparent authority is the basis of the decision, any acts tending toward ASME’s direct fault, ratification or actual authorization have no bearing on a finding of apparent authority because the crux of the doctrine is the *appearance of authority to third parties*.⁵¹

The expansiveness of the Court’s decision on vicarious antitrust liability is unclear as Justice Blackmun asserts, “We need not delineate today the outer boundaries of standard-setting organizations for the actions of their agents committed with apparent authority.”⁵²

In a forceful dissent, Justice Powell, joined by Justices White and

that ASME was faultless but only that the adoption of a no-fault apparent authority doctrine does not require consideration of the principal’s own wrongdoing and is an overly expansive addition to the antitrust laws. Under the apparent authority theory even the assumption that ASME was blameless in its own right requires the same finding of liability. Thus, there is no way for a principal to guard against a treble damages judgment when his agent intentionally violates the antitrust laws.

48. 102 S. Ct. at 1944 n.7 (“Evidently, in recent years no Court of Appeals other than the Second Circuit (in *Hydrolevel*) has directly decided whether a principal can be held liable for antitrust damages based on an apparent authority theory.”)

49. 102 S. Ct. at 1942. *See also* RESTATEMENT (SECOND) OF AGENCY §§ 257, 261, 262 (1957).

50. 102 S. Ct. at 1948.

51. *See supra* notes 54-57 and accompanying text. *See also* 102 S. Ct. at 1956 n.18 (“The Courts theory [of apparent authority] makes ratification by ASME irrelevant.”).

52. 102 S. Ct. at 1948.

Rehnquist,⁵³ sets forth the primary weaknesses of the majority opinion upon which this comment expounds: (1) apparent authority previously had no application in antitrust law, (2) even when applied outside of the antitrust area, apparent authority did not permit imputation of punitive damages to the principal, (3) the majority disregards the fact that the Sherman Act section 1 claim brought against ASME requires the defendant to engage in a conspiracy and (4) nonprofit organizations previously have not been subjected to antitrust law's treble damages.

Apparent Authority and Antitrust Liability: An Incompatible Combination

Apparent authority exists when an agent is not actually authorized to act for the principal, but a third party reasonably believes the agent acts with authority because the principal placed the agent in a position creating this appearance.⁵⁴ After the principal initially creates the appearance of authority, apparent authority becomes a no fault concept where the principal is liable even when the agent intentionally acts against the principal's interests.⁵⁵ However, since the apparent authority concept is based on the objective theory of contracts,⁵⁶ it is generally applicable only to contractual relationships and certain limited areas of tort, such as fraud and misrepresentation.⁵⁷ For conventional torts, the apparent authority doctrine has no application.⁵⁸ Since antitrust involves statutory law with actions brought neither in tort nor contract, a choice between the two theories of liability was required.

53. *Id.* at 1949.

54. This definition does not encompass the complete scope of apparent authority but rather is fitted to the situation in *Hydrolevel*. For complete definitions see *supra* note 5.

55. W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 57 (1964).

56. Cook, *Agency by Estoppel*, 5 COL. L. REV. 36 (1905), "[T]he thesis of the present article is that the liability in question is a true contractual liability, as well where the authority of the agent is only apparent as where it is real." *Id.* at 38. Compare H. REUSHLIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 23 (1979).

57. See RESTATEMENT (SECOND) OF AGENCY §§ 257, 261, 262 (1957).

58. The Second Circuit Court conceded that with conventional torts the principal is liable only if he is at fault or the agent acts within his scope of employment with an intent to benefit the principal. 635 F.2d at 125.

The issue before the courts in *Hydrolevel* thus became whether an anti-trust conspiracy to restrain trade should be analogized to either the conventional torts (disallowing apparent authority liability) or the fraud/misrepresentation type torts (permitting apparent authority liability) to justify adopting either's brand of vicarious liability, or whether the antitrust action deserves an entirely distinct theory of liability?⁵⁹

Prior to *Hydrolevel*, the Supreme Court and the lower federal courts considering the questions of vicarious antitrust liability, without exception, opted for the conventional tort-scope of employment-brand of liability where the agent's unauthorized acts are imputed to the principal only when the acts are done with an intent to benefit the principal.⁶⁰ These courts have rejected the possibility of expanding vicarious antitrust liability on an apparent authority basis either expressly or by implication.⁶¹ Had the Court remained on this established course, ASME's liability would rest on its own fault and not on unpreventable fraudulent conduct designed to benefit another.

59. The district court chose to apply the conventional tort theory and refused to allow ASME's liability on an apparent authority basis. *Id.* The circuit court admitted that a vicarious liability choice was required but Justice Blackmun in adopting the apparent authority theory failed to acknowledge the existence of the conventional tort brand of vicarious liability or the necessity of choosing between the theories. Since Hardin and James, the ASME agents, acted fraudulently and outside their scope of employment, the conventional tort theory would find ASME liable only if it was independently at fault, but the apparent authority theory holds the principal liable regardless of his own fault. *See supra* note 5; *see also* RESTATEMENT (SECOND) OF AGENCY §§ 257, 261, 262 (1957).

60. *See* 102 S. Ct. 1935, 1944 n.7, 1950 (dissent).

61. *See* *United States v. Hilton Hotels*, 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied sub nom. Western Int'l Hotels Co. v. United States*, 409 U.S. 1125 (1973) (citing *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 128-29 (5th Cir. 1962)), ("A purpose to benefit the corporation is necessary . . ."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir. 1978). *But cf.* *Continental Baking Co. v. United States* 281 F.2d 137, 150-51 (6th Cir. 1960); *United States v. Continental Group, Inc.*, 603 F.2d 444, 468 n.5 (3d Cir. 1979) (not mentioning apparent authority). *Compare Hydrolevel*, 102 S. Ct. at 1951 n.5.

Applying Apparent Authority to Antitrust Law: A Deviation From Precedent

In *United Mine Workers v. Coronado Coal*⁶² and *Coronado Coal v. United Mine Workers*⁶³ the Supreme Court reversed decisions holding an international union vicariously liable for a local union's conspiracy to restrain trade in violation of the Sherman Act. The president of the international union, with apparent authority but no actual authority, assured certain local union members of funds for their strike involvement and otherwise appeared to authorize the strike.⁶⁴ Chief Justice Taft, speaking for the Court, declared, "The president had no authority to order or ratify a local strike. [His actions show] sympathy with its purpose and a lack of respect for the law but [do] not imply or prove on his part any initiation or indicate a desire to ratify the transaction. . . ."⁶⁵

The Court in *Coronado Coal* and *United Mine Workers* followed the conventional tort basis of vicarious antitrust liability and rejected the nofault apparent authority approach. It stated:

[A] trades-union . . . might be held liable . . . but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.

A corporation is responsible for the wrongs committed by its agents in the course of its business *But it must be shown that it is in the business of the corporation.* Surely no stricter rule can be enforced against an unincorporated organization like this.⁶⁶

In *Hydrolevel*, Justice Blackmun's opinion summarily disposes of the *Coronado Coal* and *United Mine Workers* precedent in a footnote by asserting that, "Those cases, however, are not controlling here. The Court [in *Coronado Coal v. United Mine Workers*] expressly pointed out: 'Here it is not a question . . . of holding out an appearance of

62. 259 U.S. 344 (1922).

63. 268 U.S. 295 (1925).

64. *Id.* at 300, 303.

65. *United Mine Workers v. Coronado Coal*, 259 U.S. at 394.

66. *Coronado Coal v. United Mine Workers*, 268 U.S. at 304 (emphasis added).

authority on which some third person acts.' ”⁶⁷

Justice Blackmun utilizes a single sentence from fifty pages of precedent to assert that the two cases are not a rejection of the apparent authority theory for antitrust litigation. The same interpretation of the two cases and of the single-sentence excerpt is not adopted by the dissent nor by federal courts citing the cases as precedent.⁶⁸ In rebutting Justice Blackmun’s claim, Justice Powell asserts, “The majority quotes this language but misses its point. The *United Mine Workers* Court well could have characterized the cases before it as involving an exercise of apparent authority by the local union or the national President; it refused to do so.”⁶⁹

*Truck Drivers Local No. 421 v. United States*⁷⁰ quotes extensively from *United Mine Workers* and *Coronado Coal*, including the excerpt challenged by the majority in *Hydrolevel*. *Truck Drivers* ruled that “to bind the union in an antitrust situation such as this,⁷¹ actual and authorized agency was necessary; *mere apparent authority would not be sufficient to take the matter to the jury . . .*”⁷²

In *United States v. Ridglea State Bank*,⁷³ the Fifth Circuit eliminate was faced with the same choice over vicarious liability as the Supreme Court in *Hydrolevel*; whether a principal’s liability for statutory punitive damages should extend to apparently authorized agents acting with no intent to benefit the principal, or whether the conventional tort-scope of employment-basis should serve as the standard. *Ridglea State Bank* involved a bank vice-president who fraudulently processed federally insured housing loans and subsequently shared the proceeds with the defaulting borrower.⁷⁴ The federal government sued the bank for

67. *Hydrolevel*, 102 S. Ct. at 1946 n.12.

68. See, e.g., *Truck Drivers Local No. 421 v. United States*, 128 F.2d 227, 235 (8th Cir. 1942).

69. 102 S. Ct. 1950 n.5 and accompanying text.

70. 128 F.2d 227 (8th Cir. 1942).

71. *Truck Drivers Local No. 421* involved a § 1 Sherman Act violation brought against the Teamsters Union and others. The defendants were convicted of conspiring to fix milk prices, but the decision was reversed by the Eighth Circuit holding that the acts of the separate union divisions and of the individual union officials could not be imputed to the entire organization unless actual authority or ratification were proved.

72. 128 F.2d at 235 (emphasis added).

73. 357 F.2d 495 (5th Cir. 1966).

74. *Id.* at 496-97.

the agents' fraud under the False Claims Act which imposed double damages upon violators.

The *Ridglea* court granted that a principal is generally liable for fraud or misrepresentation of an agent even when acting only with apparent authority.⁷⁵ The court recognized the vicarious liability choice before it and stated, "We find ourselves confronted with two rules on the imputation of an agent's fraudulent intent to his employer and a case which falls somewhere between the usual areas of the operation of the two rules."⁷⁶ By refusing to impute liability to the principal, the court chose to view the application of apparent authority to common law fraud⁷⁷ as inapplicable to a statutory punitive damages action. It stated, "All of these authorities concern civil actions to recover actual loss caused by the misrepresentation of an employee; not, as here, actions to recover forfeitures and double damages far in excess of actual loss."⁷⁸ *Ridglea's* logic for refusing to impose excessive statutory double damages becomes even more powerful when applied to an anti-trust action for treble damages.

Punitive Damages: An Unsound Extension

Hydrolevel also marks the unprecedented imputation of punitive damages to a principal liable under the apparent authority doctrine.⁷⁹ In permitting a treble damages judgment against ASME, the Court disregards rigidly defined punitive damages boundaries which require direct fault of the principal when his agent acts outside the scope of employment.⁸⁰ In *Hydrolevel*, the Court places the immense burden of punitive damages upon a principal who admittedly is not deserving of punishment.⁸¹ It is deep-rooted in the law that exemplary damages can

75. *Id.* at 499.

76. *Id.*

77. RESTATEMENT (SECOND) OF AGENCY § 257(d) (1937).

78. *Ridglea*, 357 F.2d 499. Justice Blackmun cited to *Ridglea* but made no attempt to distinguish the case.

79. 102 S. Ct. at 1950-51. "Nor does the Court cite a single decision in which the apparent authority theory of liability has been applied in a case involving treble or punitive damages and an agent who acts without any intention of benefiting the principal." *Id.* at 1950.

80. *Id.* at 1950-51.

81. The Second Circuit Court characterized ASME's involvement as "uninten-

be awarded only against one who has participated in the offense or wrong complained of,⁸² and are "not given against those liable, if at all, [merely] by reason of their relation to the wrongdoer. . . ."⁸³

The Supreme Court, in the 1893 landmark decision of *Lake Shore and Michigan Southern Railway Co. v. Prentice*,⁸⁴ held that "[a] principal . . . cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of the agent."⁸⁵ In following *Lake Shore* and refusing to assess punitive damages in an apparent agency situation, the court in *Ridglea State Bank*⁸⁶ expounded upon "the rule . . . that the knowledge or guilty intent of an agent, not acting with a purpose to benefit his employer, will not be imputed to the employer."⁸⁷ The *Hydrolevel* Court discarded this rule and found ASME liable even though ASME did not encourage or adopt the malevolent actions of its agents. ASME, in fact, was a victim of its agents' active deception and could not benefit from, nor guard against, conduct motivated by a desire to serve another.⁸⁸

In *Hydrolevel*, "the Court practically concedes that an apparent authority rule of liability has rarely, if ever, been used to impose punitive damages upon the principal."⁸⁹ Justice Blackmun "[r]ather than

tional participation." 635 F.2d at 131.

82. *Lake Shore & Michigan S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893); *Aetna Life Ins. Co. v. Brewer*, 56 App. D.C. 283, 12 F.2d 818 (1926); *Hogg v. Plant*, 145 Va. 175, 133 S.E. 759 (1926).

83. *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 1656, 1657, 18 So. 707, 708 (La. 1895) (emphasis added). See generally 22 AM. JUR. 2d *Damages* §§ 255 (1965) ("Exemplary damages are not recoverable against a defendant who acts in good faith. . . .") *Id.* at § 255; (requiring the agent act within the scope of his employment) *Id.* at § 258.

84. 147 U.S. 101 (1893).

85. *Id.* at 107.

86. 357 F.2d 495 (5th Cir. 1966).

87. *Id.* at 500. See also Note, *Corporate Criminal Liability For Acts in Violation of Company Policy*, 50 GEO. L.J. 547, 560 n.64 (1962), "[P]unitive damages are penal in character and should be imposed in addition to compensatory damages only where the corporate management has acted with malice or recklessness." See also *Mercury Motor Express, Inc. v. Smith*, 393 So. 2d 545, 549 (Fla. 1981) ("Before an employer may be held vicariously liable for punitive damages under the doctrine of respondent superior, there must be some fault on his part.").

88. See 102 S. Ct. at 1955.

89. *Id.* at 1951.

contest this well-established rule of agency law . . . argues that *treble damages are not punitive* or, even if they are, the purpose of the anti-trust laws overrides the basic rule of the law of agency.”⁹⁰

Justice Blackmun’s position as to the purpose and effect of anti-trust treble damages is directly contra to earlier Supreme Court decisions, lower federal court rulings and the stance taken by the recognized commentators in the field.⁹¹ Justice Blackmun’s assertion that, “the antitrust private action *was created primarily as a remedy for the victims* of antitrust violations,”⁹² is diametrically opposed to the Supreme Court’s explication of the antitrust treble damages action in 1981. In *Texas Industries v. Radcliffe Materials, Inc.*, the Court ruled that, “*the very idea of treble damages reveals an intent to punish* past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.”⁹³ Justice Blackmun’s new interpretation of treble damages as non-punitive is flatly rejected by Professors Areeda and Turner as they state, “[W]hether or not compensatory damages ever punish, treble damages are indisputably punishment.”⁹⁴ Clearly, treble damages were “intended to be punitive in nature and deterrent in effect.”⁹⁵

The wisdom of imputing the punishment of treble damages under an apparent authority theory is also questionable in view of *Ridglea State Bank’s* rejection of apparent authority as a basis for imputing double damages; “What is important for the proper decision of this case is that the present action is not primarily one for the recovery of a loss caused by an employee, but is one which, if successful, *must result in a recovery wholly out of proportion to actual loss.*”⁹⁶

Furthermore, apparent authority and punitive treble damages become overtly incompatible concepts when the basis for apparent agency liability is reviewed. Apparent agency stems from the reasoning that although the principal and plaintiff are both innocent parties to the

90. *Id.* (emphasis added).

91. See *infra* notes 93-96 and accompanying text.

92. 102 S. Ct. at 1947 (emphasis added).

93. 451 U.S. 630, 639 (1981) (emphasis added).

94. 2 AREEDA & TURNER § 311(b) (1978) (“In addition, treble damages constitute punishment that is analogous in many ways to criminal sanctions.”). See generally K. ELZINGA, THE ANTITRUST PENALTIES, A STUDY IN LAW AND ECONOMICS (1977).

95. 1 H.A. TOULMIN, ANTITRUST LAWS § 20.5 (1949).

96. 357 F.2d at 500 (emphasis added).

action, the plaintiff should not bear the loss since the principal's initial relationship with the agent created the damaging situation.⁹⁷ It is anomalous, therefore, to subject the principal to three times the actual damages suffered when the injured party, as in *Hydrolevel*, has alternative avenues for redress by way of a tort action in state court.⁹⁸

Conspiracy in Restraint of Trade: Unidentified or Abandoned?

ASME's liability emanates from a conspiracy in restraint of trade in violation of the Sherman Act.⁹⁹ The Court analogizes this antitrust action to a common law suit for fraud or misrepresentation¹⁰⁰ but fails to recognize that the antitrust conspiracy requires a plurality of actors whereas the common law actions may be occasioned by a single perpetrator.¹⁰¹ It is rudimentary that one cannot conspire with oneself,¹⁰² but by finding ASME liable as a coconspirator with its own agents, the Court ignores this basic tenet of antitrust and conspiracy law. While it is clear that a business entity and its agents alone cannot constitute the requisite plurality of actors in a conspiracy because the principal is one

97. RESTATEMENT (SECOND) OF AGENCY §§ 8, 159 (1957).

98. *Hydrolevel* could have utilized the apparent authority doctrine in a state court tort action against ASME for fraud, misrepresentation, etc. to recover compensatory damages for its actual loss rather than treble damages from an antitrust claim. *Hydrolevel*, in fact, initiated its action in tort for trade libel and interference with business relations, but eventually abandoned the claims. 635 F.2d 126, n.5. Since *Hydrolevel* otherwise had the opportunity to seek redress, the Courts' autogenous theory of vicarious antitrust liability through apparent authority served no purpose other than that of increasing the damages amount.

99. 102 S. Ct. 1956.

100. *Id.* at 1942.

101. ATTORNEY GENERAL, REPORT OF THE NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 31 (1955).

102. 2 KINTNER, FEDERAL ANTITRUST LAW § 9.7 (1980); Welling, *Intra Corporate Plurality in Criminal Conspiracy Law* 33 HASTINGS L.J. 1151, 1158 (1982); Barndt, *Two Trees Or One? - The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158, 180 (1962) (if there is only one active participant "[r]egardless of whether the action is brought against the corporation, the officer . . . or both, the only possible result upon grounds of both logic and precedent, is that a violation of the conspiracy portions of the Sherman Act cannot exist"). See generally Note, *Developments in the Law - Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959).

with the agent,¹⁰³ it is unsettled whether this fundamental precept of business enterprise is likewise applicable to a non-profit association.¹⁰⁴ However, if logically extended to associations, the rule makes ASME's relationship to its agents incapable of satisfying the plurality requirement of the Sherman Act, i.e. by definition, no conspiracy exists, thus making the restraint of trade not violative of Sherman Act section 1.¹⁰⁵

There is some authority holding that if the agent is outside his scope of employment, as in *Hydrolevel*, the rule is vitiated making the entity capable of conspiring with the agent.¹⁰⁶ But this theory, if applied, also shields ASME from liability because if "James and Hardin had sufficiently independent motivation to conspire with ASME, they could not *simultaneously and by the same act* cause ASME to conspire with them; otherwise, a single person acting alone could create a multi-party antitrust conspiracy."¹⁰⁷

The *Hydrolevel* Court failed to reconcile these rules of antitrust and conspiracy law, and in fact, did not address the conspiracy issue. As noted in the dissent, "The intersection of the law of agency and vicarious liability with the law of conspiracy makes this a complex case. Yet the Court does not recognize this complexity. Indeed, the Court never identifies who conspired with whom."¹⁰⁸

103. Welling *supra* note 102, at 1158-67; *See, e.g.,* Goldlaw, Inc. v. Shubert, 276 F.2d 614, 745 (3d Cir. 1960). Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc., 531 F.2d 910 (8th Cir. 1976); Solomon v. Houston Corrugated Box Co., 526 F.2d 389 (5th Cir. 1976); Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953)

It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Id. at 914.

104. *See* 2 KINTNER, FEDERAL ANTITRUST LAWS § 9.16 (1980) (Kintner argues that this principle is not applicable to trade associations).

105. *See supra* note 103 and accompanying text.

106. H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399-400 (4th Cir. 1974).

107. Reply Brief of Petitioner at 13, American Soc'y Mechanical Eng'rs v. Hydrolevel Corp., 102 S. Ct. 1935 (1982) (emphasis original).

108. *Hydrolevel*, 102 S. Ct. at 1956 n.18.

"[The Court] so expands the concept of vicarious liability as to leave little

Furthermore, liability for ASME, while only an “unintentional participant”¹⁰⁹ in an antitrust conspiracy, gives rise to the incongruous concept that ASME was a coconspirator without intent.¹¹⁰ However, this arguably illogical concept is not foreign to the laws of antitrust because it is a general rule “that a civil (antitrust) violation can be established by proof of either an unlawful purpose or an anticompetitive effect” (no intent).¹¹¹ Even so, this long established rule does not entirely vitiate the importance of the defendant’s intent in a civil antitrust action.¹¹² Even when civil liability is primarily based upon a mere anticompetitive effect, intent remains an important determinant.¹¹³ Arguably, then, if the antitrust defendant has no wrongful intent or knowledge of a possible anticompetitive effect, as the Second Circuit held in *Hydrolevel*,¹¹⁴ liability should be narrowly defined so as to exclude apparent authority as a basis¹¹⁵ for liability. More importantly,

content, in this case, to the requirement in § 1 of the Sherman Act that antitrust plaintiffs demonstrate a contract, combination or conspiracy. Did James — acting for ASME — conspire with Hardin — acting for M & M and Hartford Steam . . . ? Or was it the other way around? Could it be said under the Court’s theory, that James conspired with himself — as a double agent — thereby committing both of his “principals” to an antitrust conspiracy?”

Id.

109. *Id.* at 1956 (quoting the Second Circuit Court, 635 F.2d at 131).

110. See Wirtz, *Purpose and Effect in Sherman Act Conspiracies*, 57 WASH. L. REV. 1, 45 (1981). See also Howe & Badger, *supra* note 1, at 361-62, 388; W. LAFAYE & A. SCOTT, CRIMINAL LAW 464-65 (1972) (“in a conspiracy, two different types of intent are generally required, the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy.”) Compare Note, *Developments in the Law - Criminal Conspiracy*, 72 HARV. L. REV. 920, 1000-05 (1959).

111. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978); *United States v. Container Corp.*, 393 U.S. 333, 337 (1969); *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911); *Standard Oil Co. v. United States* 221 U.S. 1, 58 (1911).

112. *United States Gypsum Co.*, 438 U.S. at 436 n.13.

113. *Id.* (“[o]f course consideration of intent may play an important role in divining the actual nature and effect of the alleged anti-competitive conduct”). See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

114. See 635 F.2d at 131.

115. Howe & Badger, *supra* note 1, at 388 (“proof of apparent agency, simply should not be admissible”).

intent is clearly a significant factor in choosing the sanction to be imposed upon the antitrust violator,¹¹⁶ and defendants without a wrongful intent, such as ASME, should not be subject to punitive treble damages.¹¹⁷

In assessing the results of Justice Blackmun's refusal to deal with these important but unsettled areas of conspiracy and antitrust law, Justice Powell proclaims: "The Court simply opens new vistas in the law of conspiracy and vicarious liability, as well as in the imposition of the harsh penalty of punitive damages."¹¹⁸ "In view of this . . . one would not have expected the Court to take the occasion of this case to promulgate an expansive rule of antitrust liability not heretofore applied by it to a commercial enterprise much less to a nonprofit organization."¹¹⁹

Nonprofit Organizations: New Victims For Treble Damages

In holding ASME liable as a Sherman Act violator, the Supreme Court "[substantially broadens] the treble damages concept"¹²⁰ by applying the strict sanction to a nonprofit organization for the first time.¹²¹ In *Goldfarb v. Virginia State Bar*¹²² the Court ruled that non-

116. Wirtz, *supra* note 110, at 44-47.

117. The question thus arises whether the mere act of entering, without a wrongful purpose, into an agreement that proves to have anti-competitive effects, renders a party liable to the full range of Sherman Act sanctions, including treble damages and criminal punishment. It would be surprising if the answer were yes.

Id. at 45. See also Areeda, *Antitrust Immunity for State Action after Lafayette*, 95 HARV. L. REV. 435, 455 (1981) ("[A]ntitrust liability does not necessarily call for a damage remedy . . . [T]he Supreme Court may come to agree that antitrust liability may vary according to the remedies sought.").

118. 102 S. Ct. 1935, 1956. "[The Court] stretches the concept of vicarious liability beyond its rational limits to conceive of Hardin and James as conspiring on behalf of ASME when they acted . . . against the interests of ASME." *Id.* at 1936.

119. *Id.* at 1950.

120. Young, *Court Widens Treble Damage Liability for Nonprofit Societies*, 68 A.B.A. J. 846 (1982).

121. *Id.* See also 102 S. Ct. at 1935, 1949 n.2.

122. 421 U.S. 773 (1975). The *Goldfarb* Court ruled that a state bar association's practice of publishing a minimum fee schedule for attorneys constituted price-fixing in violation of the Sherman Act, and was an enjoined activity. *Id.*

profit associations were not entirely exempt from the antitrust laws.¹²³ However, in so doing the Court urged that such associations be allowed a different standard of liability than the typical commercial antitrust defendant. The *Goldfarb* Court ruled that:

It would be unrealistic to view [these associations] as interchangeable with other business activities, and automatically to apply . . . antitrust concepts which originated in other areas. The public service aspects and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.¹²⁴

Goldfarb's holding that noncommercial organizations are deserving of a narrower view with respect to potential antitrust liability was reiterated in *National Society of Professional Engineers v. United States*¹²⁵ where the Court upheld an injunction against a nonprofit society. The Court ruled that an appropriate antitrust remedy could be "fashioned" for the nonprofit defendant,¹²⁶ and stated that, "the standard . . . is whether the relief represents a *reasonable method of eliminating the consequences* of the illegal conduct."¹²⁷ Arguably, ASME's treble damages liability does not follow this standard and, at best, actual damages might have served as a more appropriate sanction.¹²⁸

Interestingly, the *National Society of Professional Engineer's* holding was supported by Justice Blackmun who stated in a concur-

Prior to *Goldfarb* it was generally assumed that professional associations like ASME, were exempt from the operations of antitrust laws. See *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 13-15 (4th Cir. 1974); Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW., 570, 571-92 (1975).

123. 421 U.S. at 787.

124. *Id.* at 788 n.17.

125. 435 U.S. 679 (1978) ("We adhere to the view expressed in *Goldfarb* that, by nature, professional services may differ significantly from other business services. . . ."). See generally Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEO. L.J. 1187 (1979); Note, *Rule of Reason, Per Se Rule and Professional Groups: National Society of Professional Engineers v. United States*, 20 B.C. L. REV. 716 (1979).

126. 435 U.S. at 697.

127. *Id.* (emphasis added).

128. See *supra* notes 114-17 and accompanying text.

rence, "In my view, the decision in *Goldfarb* . . . properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation."¹²⁹ Arguably, *Hydrolevel* sees this "flexibility" approach to nonprofit entities ignored as the majority disregards ASME's nonprofit status¹³⁰ and rigidly imposes treble damages. The Court states, "the fact that ASME is a nonprofit organization *does not weaken the force* of the antitrust . . . principles that indicate that ASME should be liable"¹³¹

Even though ASME was not a business competitor of anyone,¹³² the Court, in finding the nonprofit organization liable, claims to follow the intent of Congress.¹³³ In fact, the Congressional author of the anti-trust act, Senator Sherman addressed the issue of extending liability under the act to noncommercial entities such as ASME. He stated, "[The act] does not interfere in the slightest degree with voluntary associations . . . to advance the interests of a particular trade or occupation. They are not business combinations. They do not deal with contracts, agreements, etc. They have no connection with them."¹³⁴ Clearly, "this legislative history . . . counsel[s] against adopting a new rule of agency law that extends the exposure of such [nonprofit] organizations to potentially destructive treble damage liability."¹³⁵

Conclusion

The Supreme Court's decision in *American Society of Mechanical Engineers v. Hydrolevel*¹³⁶ expands potential antitrust liability by rejecting four established principles of liability: (1) the apparent authority theory of the law of agency previously had no application in anti-

129. 435 U.S. at 699 (emphasis added).

130. 102 S. Ct. 1947 ("in addition, ASME contends it should not bear the risk of loss for antitrust violations committed by its agents acting with apparent authority because it is a nonprofit organization, not a business seeking profit. But it is beyond debate that nonprofit organizations can be held liable").

131. *Id.* at 1947-48 (emphasis added).

132. *Id.* at 1956.

133. *Id.* at 1943 n.6.

134. 21 CONG. REC. 2562 (1890).

135. 102 S. Ct. at 1952.

136. *Id.* at 1935.

trust law,¹³⁷ (2) when apparent authority was used outside the antitrust area, it disallowed imputation of punitive damages to the principal,¹³⁸ (3) a Sherman Act conspiracy to restrain trade generally required a plurality of actors¹³⁹ and (4) nonprofit organizations previously were free from the treble damages sanction for liability in antitrust.¹⁴⁰ *Hydrolevel* unnecessarily “launches on an uncharted course”¹⁴¹ by broadening antitrust liability, especially because ASME was already found responsible by the district court on traditional antitrust grounds.

James R. Palmer

137. See *supra* notes 54-78 and accompanying text.

138. See *supra* notes 79 - 98 and accompanying text.

139. See *supra* notes 99 - 119 and accompanying text.

140. See *supra* notes 120 - 135 and accompanying text.

141. 102 S. Ct. at 1951. (Powell, J., Dissent).